EDITOR'S NOTE

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. 85-1347-CSY
atus: GRANTED

Title: Pennsylvania, Petitioner
v.
George F. Ritchie

cketed:
bruary 10, 1986

Court: Supreme Court of Pennsylvania, Western District

Counsel for petitioner: Clark, Edward Marcus

Counsel for respondent: Corbett Jr., John H.

try	Date	Note	Proceedings and Orders
1	Feb 10 1986	G	Petition for writ of certiorari filed.
2	Mar 19 1986		DISTRIBUTED. April 4, 1986
3	Mar 31 1986	F	Response requested.
4	Mar 16 1986	X	Brief of respondent George F. Ritchie in opposition filed.
5	Mar 16 1986	N	Motion of respondent for leave to proceed in forma pauperis filed.
6	May 6 1986		REDISTRIBUTED. May 22, 1986
7	May 27 1986		Petition GRANTED.
			**********
9	Jun 20 1986		Order extending time to file brief of petitioner on the merits until August 11, 1986.
10	Jun 27 1986	D	Motion of respondent for leave to proceed further herein in forma pauperis filed.
11	Jun 27 1986		REDISTRIBUTED. July 2, 1986
12	Jul 7 1986		Motion of respondent for leave to proceed further herein in forma pauperis DENIED. John H. Corbett, Jr., Esquire, of Pittsburgh, Pennsylvania, a member of the Bar of this Court, is invited to brief and argue this case, as amicus curiae, in support of the judgment below.
13	Jul 21 1986		Record filed.
14	Jul 31 1986		Executed affidavit received from respondent.
15	Aug 8 1986	G	Motion of Appellate Committee of the District Attorneys Association of California for leave to file a brief as amicus curiae filed.
16	Aug 8 1986		Brief amicus curiae of PA Coalition Against Rape, et al. filed.
17	Aug 8 1986		Brief amicus curiae of County of Allegheny, PA, etc. filed.
18	Aug 11 1986		Brief of petitioner Pennsylvania filed.
19	Aug 11 1986		Joint appendix filed.
20	Aug 11 1986		Brief amicus curiae of California, et al. filed.
21	Aug 5 1986	G	Motion of Sunny von Bulow National Victim Advocacy Center, Inc., et al. for leave to file a brief as amici curiae filed.
23	Sep 5 1986		Brief of John H. Corbett, Jr. as Amicus Curiae in support of the judgment below filed.
24	Sep 24 1986		Motion of Appellate Committee of the District Attorneys Association of California for leave to file a brief as amicus curiae GRANTED.
25	Oct 6 1986		Motion of Sunny von Bulow National Victim Advocacy Center, Inc., et al. for leave to file a brief as amici

85-1347-CSY

try	Date	Note	Proceedings and Orders
			curiae GRANTED. Justice Scalia OUT.
6	Oct 6 1986		SET FOR ARGUMENT. Wednesday, December 3, 1986. (3rd case) (1 hour).
7	Oct 22 1986		CIRCULATED.
8	Nov 24 1986	X	Reply brief of petitioner Pennsylvania filed.
9	Dec 3 1986		ARGUED.

85 - 1347

No. _____

IN THE

Supreme Court of the United States

October Term, 1985

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

GEORGE F. RITCHIE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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88 pp

QUESTION PRESENTED FOR REVIEW

Has the Supreme Court of Pennsylvania impermissibly expanded the constitutional protections mandated by the Sixth Amendment by concluding that an accused in a rape-incest prosecution invariably is entitled, on the strength of a speculative claim of need, to unrestricted pre-trial access to presumptively confidential, non-prosecutorial records concerning the child-victim and her family, despite their prior in camera review by the trial judge for statements attributable to the victim, and notwithstanding the fact that the prosecution neither possessed nor employed the materials at any stage of the criminal proceeding?

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OPINIONS BELOW

The majority and dissenting Opinions of the Supreme Court of Pennsylvania, copies of which are set forth as Appendix A, are as yet unreported. The majority Opinion and concurring and dissenting statements of of the Superior Court of Pennsylvania, set forth as Appendix B, are reported at 324 Pa. Super. 557, 472 A.2d 220 (1984).

STATEMENT OF JURISDICTION

The Judgment of the Supreme Court of Pennsylvania was entered on December 11, 1985, and this petition was filed within sixty (60) days of that date in compliance with Rule 20(1) of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

PENNSYLVANIA STATUTE INVOLVED

Act 1975, November 26, P.L. 438, No. 124, §15 provides:

Confidentiality of Records.

(a) Except as provided in section 14, reports made pursuant to this act including but not limited to report summaries of child abuse made pursuant to section 6(b) and written reports made pursuant to section 6(c) as well as

any other information obtained, reports written or photographs or x-rays taken concerning alleged instances of child abuse in the possession of the department, a county public child welfare agency or a child protective service shall be confidential and shall only be made available to:

(1) A duly authorized official of a child protective service in the course of his official duties.

(2) A physician examining or treating a child or the director or a person specifically designated in writing by such director of any hospital or other medical institution where a child is being treated, where the physician or the director or his designee suspect the child of being an abused child.

(3) A guardian ad litem for the child.

(4) A duly authorized official of the department in accordance with department regulations or in accordance with the conduct of a performance audit

as authorized by section 20.

(5) A court of competent jurisdiction pursuant to a court order.

* * *

STATEMENT OF THE CASE

A. Statement of the Proceedings

Respondent, George F. Ritchie, was charged by Information filed August 17, 1979, in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, with Rape,[1] Involuntary Deviate Sexual Intercourse,[2] Incest,[3] and

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1 18 Pa. C.S. §3121 (Pennsylvania Crimes Code). Rape is a felony of the first degree punishable by a term of imprisonment, the maximum of which is more than ten (10) years. 18 Pa. C.S. §106(a)(2).

2 18 Pa. C.S. §3123. Involuntary Deviate Sexual Intercourse is a felony of the first degree.

Corrupting the Morals of Minors[4] in four respective counts. The matters were tried to a jury, and on November 13, 1979, respondent was adjudicated guilty as charged.

Respondent was sentenced January 8, 1981, to terms of incarceration of three (3) to ten (10) years for Rape and Involuntary Deviate Sexual Intercourse, to be served concurrently; additional terms of two and one-half (2 1/2) to five (5) years were imposed at the remaining counts, also to be served concurrently

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FOOTNOTE 3, FROM PAGE 4.

3 18 Pa. C.S. §4302. Incest is a misdemeanor of the first degree punishable by a term of imprisonment not to exceed five (5) years. 18 Pa. C.S. §106(a)(6).

4 18 Pa. C.S. §6301. Corruption of Minors is a misdemeanor of the first degree.

with those imposed at Counts One and Two.

On February 3, 1984, the Superior Court of Pennsylvania rejected respondent's appellate claims regarding the evidentiary sufficiency of the prosecution's case and the trial court's disposition of certain evidentiary matters not here relevant. However, the judgments of sentence were vacated, and the case was remanded to the trial court with directions to "review the CWS records in camera to determine whether they contain any statements made by Jeanette regarding abuse." Commonwealth v. Ritchie, 324 Pa. Super. 557, ___, 472 A.2d 220, 226 (1984)(Appendix B). Respondent -- through counsel -- was then to be permitted to review, in their entirety, those records to which he had been denied pre-trial access "in order to argue the relevance of the material

in accordance with the trial judge's decision." Ibid.

The Commonwealth thereafter sought and was granted review of the Superior Court's remand order. The question presented and argued to the Supreme Court of Pennsylvania was "[t]o what extent may a defendant in a child rape-incest prosecution be authorized pretrial access to records or files prepared pursuant to the reporting requirements of the child protective services law for his possible use at trial to impeach or discredit a witness-victim?"

The Supreme Court of Pennsylvania, by an Order dated December 11, 1985, affirmed the Superior Court's disposition of the case (Appendix C), persuaded by respondent's contention that the trial court's denial of his pre-trial request for production of the disputed materials

deprived him of his rights to confrontation and compulsory process guaranteed by the Sixth Amendment (Majority Opinion at 12, Appendix A).

B. Statement of the Facts Material to the Question Presented.

The charges against respondent arose following the disclosure by his then thirteen-year-old daughter Jeanette, made in confidence to an older cousin, that she had been subjected to her father's sexual depredations over a period of about four (4) years (TT 34-35, 49-51, 132-133).[5] The cousin shared this confidence with her mother, the victim's aunt (TT 133-134), who ultimately escorted the victim to police headquarters where a formal complaint

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5 Trial Transcript, November 7, 1979.

was made (TT 52-55). Specifically, the victim alleged that on June 11, 1979, respondent forced her to fellate him and them compelled her to submit to vaginal intercourse (TT 24-27, 32-34).

In pre-trial pleadings, respondent initially sought discovery from the Commonwealth of "results or reports of scientific tests, expert opinions ... or other physical or mental examination of Jeanette Biles [sic]." (RR 7).[6] Thereafter respondent subpoenaed Child Welfare Services (CWS)[7] for "records

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6 Reproduced Record of the proceedings.

7 CWS is the Allegheny County child protective services agency charged with the responsibility of monitoring and investigating reports of suspected child abuse. The agency has since been redesignated as Children and Youth Services (CYS).

pertaining to Jeanette Bills, a.k.a. Jeanette Ritchie." (RR 10). Apparently meeting with no success, respondent -- through counsel -- filed a pleading captioned Motion for Sanction, averring, inter alia, that CWS personnel "absolutely refused to recognize the authority of the subpoena." (RR 9).

The trial judge convened a pre-trial conference in chambers to hear argument on the motion. In the course of the proceeding, counsel for respondent attempted to persuade the court that:

> There is possible witnesses available out of these reports. [sic] ... There is a medical report in that file that I know about .... I'd like to see the doctor's report .... That physical examination was taken on behalf of Child Welfare Services .... The other thing is this. Whether or not their records would disclose witnesses that are not known to this defendant [sic] .... There could be defense witnesses disclosed by their records here. There could be matters in there that could be favorable to the defendant.

(HT 4-6, 10).[8]

CWS, represented at the pre-trial proceeding by an Assistant County Solicitor and an agency record custodian, explained that the agency's files contained no records of a medical examination of the victim (HT 5). Respondent's counsel, however, insisted that " ... there may not be anything [in these files], but they [CWS] have it ...." Ibid. The Assistant County Solicitor

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8 Transcript of hearing on pre-trial Motion for Sanction, October 23, 1979. This hearing was not part of the appellate record before the Superior Court prior to its February 3, 1984, judgment and order. The proceeding was recorded but not transcribed until February, 1984, at the request of the Commonwealth. Subsequently, the transcript was made a part of the record reviewed by the Supreme Court of Pennsylvania.

responded, "Those are the records of the agency." Ibid. The CWS record custodian informed the trial judge that the agency's involvement with the victim did not commence until June 22, 1981 (HT 6, 8). With respect to the non-medical materials sought by respondent's counsel, the trial court observed that " ... you are not entitled [to review the agency files] because you are not making specific allegations that can be verified or determined." (HT 10-11). The trial judge finally concluded that the medical records did not exist and entered the following Order:

> And now, October 23, 1979, after hearing in chambers, the Court having viewed the records of the Child Welfare Services, the Court finds that no medical records are being held by [the agency] that would be of benefit to the defendant in this case. Counsel for the Commonwealth, and the defendant, and a representative of the [agency] being present at the hearing.

(RR 11). Respondent's counsel immediately objected to the Order, saying that "the court did not review the records." The trial court retorted, "We didn't read 50 pages or more of an extensive record. We have asked for the medical records. There were no medical records that the court reviewed, and that is what we were told." (HT 15-16).

In directing the trial court to reconvene a hearing and to grant counsel access to the disputed records, ostensibly for the narrow purpose of arguing their relevance and utility in the event of a retrial, the Superior Court cited Davis v. Alaska, 415 U.S. 308 (1974) for the proposition that where there is tension between a defendant's right of confrontation and a state's interest in insuring the confidentiality of sensitive records, a delicate balancing must occur. The court concluded, however,

"that the need for confidentiality in this case must .... yield to appellant's right of confrontation." Commonwealth v. Ritchie, 324 Pa. Super. at ____, 472 A.2d at 225 (Appendix B).

The Supreme Court of Pennsylvania's affirmance was premised on the Sixth Amendment "counters" of the right of the accused to confront the witnesses against him and to have compulsory process for obtaining witnesses in his favor (Majority Opinion at 8, Appendix A). Following a review of several of this Court's decisions in which Sixth Amendment questions were presented, the Pennsylvania court concluded that Davis v. Alaska was the federal decision which was dispositive of the controversy. Applying Davis, the court held that the "counters" of confrontation and compulsory process tipped in favor of the respondent under a Sixth Amendment analysis. Id. at 10, 12.

REASONS FOR GRANTING THE WRIT

I.

THE SUPREME COURT OF PENNSYLVANIA HAS MISINTERPRETED THE SCOPE OF THE PRINCIPLE ANNOUNCED IN DAVIS V. ALASKA AND HAS ERRONEOUSLY CONSTRUED THE CONFRONTATION AND COMPULSORY PROCESS CLAUSES OF THE SIXTH AMENDMENT.

A. The protections afforded by the Sixth Amendment have not been extended to require the pre-trial intrusion into confidential records ordered by the Supreme Court of Pennsylvania. Despite the Supreme Court of Pennsylvania's observation that "'[t]he search for truth' and the quest for 'every man's evidence' [is] so plainly the basis of the Sixth Amendment, ..." (Majority Opinion at 11, Appendix A), this Court, in United States v. Nixon, 418 U.S. 683, 709 (1974), has embraced the venerable principle that there is a category of persons whose evidence is protected by privilege. Indeed, in McCray v. Illinois, 306 U.S. 300, 308 (1967), this

Court quoted approvingly Professor Wigmore's grudging concession of the importance of testimonial privileges regarding the "'identity of persons supplying the government with information concerning the commission of crimes.'" (Emphasis in the original). "'Communications of this kind," Wigmore admonished, 'ought to receive encouragement.'" Ibid.

In holding that the Sixth Amendment "counters" outweigh petitioner's interest in maintaining the confidentiality of the disputed records, and that respondent's pre-trial access to the materials may not be fettered by one not blessed with the "eyes and perspective of an advocate," (Majority Opinion at 12, Appendix A), the Supreme Court of Pennsylvania has unnecessarily and impermissibly expanded the principles announced in Davis v. Alaska, supra. In

the process, the Court has seriously undermined the announced purpose of Pennsylvania's Child Protective Services Law[9] -- to encourage more complete reporting of suspected child abuse. Moreover, the decision calls into question the continuing constitutional validity of common law and statutory privileges generally, ignores the traditional role of the trial judge in evaluating the validity of evidentiary privilege -- in fact, disregards totally the trial court's exercise of discretion in the regulation of the flow of evidence -- and conflicts directly with analogous cases reported in the United States

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9 Act 1975, Nov. 26, P.L. 438, No. 124, §2, imd. effective as amended 1982, June 10, P.L. 460, No. 136, §1, effective in 60 days; 1983, Oct. 21, P.L. 169, No. 42, §2, effective in 60 days.

Court of Appeals and the Supreme Court of Connecticut. See, Camitsch v. Risley, 705 F.2d 351 (9th Cir. 1983) and State v. Storlazzi, 191 Conn. 453, 464 A.2d 829 (1983).

In elegant contrast to the precise offer of proof presented by defense counsel in Davis v. Alaska -- in opposing a protective order drawn to prevent any reference to the record of juvenile adjudications of the prosecution's primary witness -- is the speculative, generalized claim of need advanced by respondent's counsel in the case at bar. In Davis, counsel disclaimed the intent to attack the seventeen-year-old witness' character generally, proposing instead to explore the witness' possible motivation to testify falsely. Counsel surmised that the witness' potential bias would be exposed if a connection could be made between his probationary

status and his eagerness to please law enforcement officials by testifying favorably. 415 U.S. at 311. In this case, however, respondent's counsel's proposal to breach the cloak of confidentiality of the Child Protective Services Law was accompanied by the following: "There is possible witnesses available out of those reports .... There could be defense witnesses disclosed .... There could be matters ... favorable to the defendant." (HT 4, 10)(emphasis supplied). It is unclear from the record whether respondent's counsel anticipated that the requested disclosure would yield information which had potential utility as substantive evidence or whether he sought the material for its impeachment value.

Nevertheless, in Davis v. Alaska, this Court permitted a limited foray into matters cloaked with that state's

considered grant of privilege based on defense counsel's narrowly tailored proffer and in contemplation of the careful balancing which must be exercised when the two worthy claims are in tension. The Supreme Court of Pennsylvania, on the other hand, has ignored totally the state's interest in encouraging more complete reporting of child abuse. The court has apparently determined that any defendant prosecuted for any offense involving children has an absolute right to investigate CWS files in preparing for trial. This unrestricted access would, of course, permit counsel to discover not just statements of the victim, or summaries of interviews with victims, but all of the necessarily raw social service data gathered by child protective service caseworkers, identities of family, friends, or neighbors who consented to

be interviewed, and -- critically in our view -- the identity of the individual who made the report which triggered the investigation.

Petitioner contends respectfully that the decision in Davis v. Alaska and this Court's construction of the relevant clauses of the Sixth Amendment do not comprehend such an intrusion. Moreover, we view the Pennsylvania Supreme Court's decision as countenancing the classic "fishing expedition" disapproved in the disclosure cases of this Court. United States v. Nixon, supra, 418 U.S. at 700 (see also, Dissenting Opinion at 2, Appendix A).

Your petitioner contends that such intrusions will seriously hamper law enforcement in this unique and sensitive area. Obviously, a crucial source of information regarding sexual offenses against children -- the family member or

friend who relies on the anonymity of the statute -- is gravely threatened. It is unrealistic, in the Commonwealth's view, to expect that the anonymity will be long preserved after it has been disclosed to counsel for a defendant. Notwithstanding the Court's exhortation regarding the dissemination permitted following counsel's review (Majority Opinion at 13, n. 16; Appendix A), petitioner is not sanguine that witnesses will step forward freely when it becomes apparent that counsel for an accused will be granted unlimited access to the entire file maintained by the child protective service agency.

Moreover, it would appear that the decision below will seriously disrupt the orderly process of discovery regulated by the Pennsylvania Rules of Criminal Procedure, Rule 305, 42 Pa. C.S. The Commonwealth is concerned that

(unlike the present case in which the disputed records were never possessed by the prosecution) all of its files, probative or not, material or not, inculpatory or not, are subject to production to the demanding defendant in a case involving selected offenses against children.

Your petitioner is obliged to note that relevant amendments have been made in the Child Protective Services Law which post-date the events from which this controversy arose. On June 10, 1982, the Pennsylvania General Assembly expanded the class to whom reports made pursuant to the statute were to be made available. Included in that expanded class are law enforcement officials[10]

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10 The term includes a county District Attorney. 55 Pa. Code §3490.4, published at 15 Pa. B. 4554 (December 21, 1985).

investigating reports of homicide, sexual abuse or exploitation, and serious bodily injury involving children. Act 1982, June 10, P.L. 460, No. 163, §15 (a)(9), (10). The release of such data, however, may not include the identity of the person who made the report of suspected abuse or of any person who cooperated in a subsequent investigation of the matter without a prior determination by the Secretary of the Department of Public Welfare that such a disclosure would not endanger the safety of the interested person. Id., §15(c).[11]

Petitioner does not understand these amendments to diminish the

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11 The Secretary of the Department of Public Welfare is required to notify such person prior to releasing such information. 55 Pa. Code §3490.94, published at 15 Pa. B. 4561 (December 21, 1985).

concerns previously expressed regarding the apparently unlimited scavenging of sensitive material authorized by the Supreme Court of Pennsylvania's decision in Commonwealth v. George F. Ritchie.

The Commonwealth believes that Ritchie is irremediably in conflict with Camitsch v. Risley, 705 F.2d 351 (9th Cir. 1983), and, as a consequence, we respectfully contend that the issue thus presented merits review by this Court. Camitsch involved a habeas corpus claim by a Montana prisoner who was refused access to the information contained in potential prosecution witnesses' juvenile case files, typically described as the juveniles' "history," for use at his trial on various sexual offenses involving children.

Camitsch sought pre-trial discovery of the youth court files for impeachment purposes. The trial court denied his

request but agreed to review the files in camera to determine whether they contained anything affecting the potential witnesses' competency or credibility. Id, 705 A.2d at 352. Camitsch was ultimately found guilty. On appeal the Montana Supreme Court held that Camitsch's right of confrontation had, indeed, been violated, but after determining that the error was harmless, affirmed the conviction. Id. at 753. In reviewing the habeas claim regarding the employment of a harmless error analysis by the state court, the United States Court of Appeals concluded:

> Camitsch attempts to expand the right of a criminal defendant under certain circumstances to introduce a juvenile offender's 'record' (i.e., the fact of a delinquency adjudication and probationary status) into a general right to rummage through the otherwise confidential case files of every juvenile witness. Davis [v. Alaska] will not stretch that far.

Ibid.

The Camitsch court noted pertinently that:

> Davis does not change the fact ... that the sensitive informal information found in a juvenile case file may be shielded from disclosure.
>
> * * *
>
> The bare contention that it is impossible to tell how defense counsel might have been able to use the various information ... is insufficient to support a finding of constitutional error in denying access [emphasis in original].
>
> * * *
>
> Camitsch does not allege that [the in camera inspection] was erroneous, but rather that had he had access to the file he might have been able to persuade the trial court to make a different finding. We are unable to find a constitutional violation on these facts.

Id. at 354. Petitioner urges this Court to adopt the reasoning of the Camitsch decision and, by analogy, to reject the constitutional analysis employed by the Supreme Court of Pennsylvania in

Ritchie. We submit that this case is appropriate for summary disposition. Cf. Delaware v. Fensterer, (No. 85-214), ___ U.S. ___, 38 Cr. L. 4067 (November 4, 1985).

Similarly, in State v. Storlazzi, 191 Conn. 453, 464 A.2d 829 (1983), the defendant, unsuccessfully, raised a Sixth Amendment claim because of the trial court's denial of pre-trial access to certain psychiatric and social agency records of the victim-complainant. The defendant sought to examine the materials for purposes of inquiring into the victim's competency to testify. The trial court ordered the records sealed, but after reviewing them in camera, denied the request. Id., 464 A.2d at 831. Counsel for defendant renewed his request following the victim's testimony on direct. Again, however, the trial court denied access. Ibid.

The Connecticut Supreme Court's initial analysis and rejection of the claim was premised exclusively on the Sixth Amendment right of confrontation[12] and included consideration of Davis v. Alaska in its discussion regarding the balancing of competing interests. Id. at 832-33. The court reviewed the disputed records and concluded that they failed "to disclose material especially probative ... so as to justify breaching their confidentiality in disclosing them to the defendant." Id. at 833.

B. To the extent that the judgment of the Supreme Court is unnecessarily expansive, imposing -- as a matter of federal constitutional law -- greater restrictions on the state's interest in

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12 The court similarly rejected Storlazzi's due process claim, apparently relying exclusively on federal authority.

preserving the statutory privilege of these or similar records when this Court has refrained from so doing, the decision is similarly flawed. Fare v. Michael C., 442 U.S. 707 (1979); Oregon v. Haas, 420 U.S. 714 (1975); North Carolina v. Butler, 441 U.S. 369 (1979).

II.

THE JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA IS PREMISED EXCLUSIVELY ON FEDERAL CONSTITUTIONAL AUTHORITY.

The Court's analysis of respondent's Sixth Amendment protections is supported by reference to Ohio v. Roberts, 448 U.S. 56 (1980), Alford v. United States, 282 U.S. 687 (1931), Smith v. Illinois, 390 U.S. 129 (1968), Washington v. Texas, 388 U.S. 14 (1967), United States v. Nixon, supra, and Davis v. Alaska, supra. The court discussed three other Pennsylvania cases, two involving decisions premised on Davis v. Alaska (see, Matter of Pittsburgh Action

Against Rape, 494 Pa. 15, 428 A.2d 126 (1981) and Commonwealth v. Slaughter, 482 Pa. 538, 394 A.2d 453 (1978)) and the third, cited for the importance of the "eye of the advocate" in assessing relevancy of evidence. Commonwealth v. Hamm, 474 Pa. 487, 378 A.2d 1219 (1977).

The Supreme Court of Pennsylvania was not presented with, and did not consider, alternative state grounds for decision.

CONCLUSION

In light of the foregoing authority, petitioner prays that a writ of certiorari should issue to review the Judgment and Opinion of the Supreme Court of Pennsylvania in Commonwealth v. Ritchie, ___ Pa. ___, ___ A.2d ___ (No. 69 W.D. Appeal Docket, 1984, filed December 11, 1985).

Respectfully submitted,

ROBERT E. COLVILLE
DISTRICT ATTORNEY

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APPENDIX A

Opinion of the Supreme Court of Pennsylvania, Western District

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

No. 69 W.D. Appeal Dkt. 1984

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

vs.

GEORGE F. RITCHIE,
Appellee.

Appeal from the Order of the Superior Court of February 3, 1984, at No. 137 Pittsburgh, 1981, vacating the Judgment of Sentence entered January 8, 1981, in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division at No. CC7903887A.

324 Pa. Super. 557, 472 A.2d 220 (1984).

Argued: March 4, 1985 Filed: December 11, 1985

OPINION

MR. JUSTICE McDERMOTT

The Commonwealth of Pennsylvania appeals, by allowance, the order of the Superior Court vacating judgment of sentence and remanding for further proceedings. We affirm and order the case remanded for proceedings consistent with this opinion.

Appendix A—Opinion of the Supreme Court of Pennsylvania, Western District.

Appellee, George F. Ritchie, stood jury trial in the Court of Common Pleas of Allegheny County, and was convicted of rape, involuntary deviate sexual intercourse, incest and corruption of minors.[1] The charges arose in connection with incidents allegedly involving sexual contacts between appellee and his minor daughter over a period of years, including one particular incident on June 11, 1979. Appellee's daughter was twelve years old at that time.

The circumstances giving rise to the instant appeal began in 1978, when appellee's counsel, in the course of preparing the defense, served a subpoena upon Child Welfare Services (CWS) seeking records pertaining to the complainant,[2] which records CWS refused to produce on the basis of the alleged confidentiality of the records. At a pretrial conference held in chambers before the trial court, counsel for appellee argued a motion for sanctions and sought access to the records in order to gain information which might impeach or discredit the complainant, or which might reveal potential witnesses. Moreover, defense counsel sought particular information concerning a medical examination of the victim which, according to his information, occurred on September 6, 1978, in conjunction with a CWS investigation. The trial court accepted the assertion of a CWS representative that such information was not in the file.[3] The court then issued an order to the following effect:

[1] Appellee's trial was his second, following a mistrial.

[2] There is evidence that Child Welfare Services conducted an interview and examination of the complainant as early as 1978, following a report of abuse made by an unidentified source.

[3] Pretrial Hearing Transcript, October 23, 1979, at 5.

Appendix A—Opinion of the Supreme Court of Pennsylvania, Western District.

> And now, October 23, 1979, after hearing in chambers, the court having viewed the records of the Child Welfare Services, the Court finds that no medical records are being held by the Child Welfare Services that would be of benefit to the defendant in this case. Counsel for the Commonwealth, and the defendant, and a representative of the Child Welfare Services being present at the hearing.

Hearing Transcript (H.T.) October 23, 1979, at 15. Appellee's counsel immediately objected to that order.

On appeal, the Superior Court rejected appellee's claims concerning the sufficiency and admissibility of certain evidence, but agreed with his contention that the trial court erred in refusing to grant appellee access to the Child Welfare Services[4] file pertaining to the examination of the complainant. The Superior Court held that a statutory provision in the Child Protective Services (Law)[5] regarding confidentiality of the records must not be permitted to infringe upon appellee's Sixth Amendment rights. *Commonwealth v. Ritchie,* 324 Pa.Super. 557, 472 A.2d 220 (1984). Nonetheless, that court refused to direct that the records be made available to appellee. Instead, relying an analogy on the decision of this Court in *Matter of Pittsburgh Action Against Rape, (Matter of Pittsburgh),* 494 Pa. 15, 428 A.2d 126 (1981), the Superior Court fashioned a remedy whereby the trial court would, after an *in camera* inspection of the file, make available to appellee only those parts of the file which it determined to constitute verbatim statements (or the equivalent) by the complainant

[4] That agency is now designated Children and Youth Services.

[5] Act of November 26, 1975, P.L. 438, No. 124 §§1-26, 11 P.S. §2201, *et seq. See also,* text accompanying n.10.

regarding abuse. *Matter of Pittsburgh, id.*, at 28, 428 A.2d at 132. That court further directed that counsel be permitted access to the entire record reviewed *in camera* by the trial court, in order to argue relevance.[6] It is the appropriateness of this remedy which lies at the heart of this appeal.

In their arguments both parties challenge the Superior Court's disposition. The Commonwealth argues that the records are presumptively confidential under the relevant statute.[7] Further, the Commonwealth argues that, if appellee's Sixth Amendment rights require that he be given access to statements contained in the CWS files, then that access should be restricted solely to such statements, and appellee's counsel should not be permitted access to the entire file to argue relevance. Appellee, on the other hand, argues that statements contained in the file constitute the minimal discovery to which he is entitled, and that, in fact, his Sixth Amendment rights require that he gain access to the entire file so that determinations concerning what information might be useful to the defense may properly be made by an advocate. For the reasons outlined below, we find persuasive appellee's arguments, and hold that the trial court erred in refusing to allow the defense access to the CWS files.

As indicated above, the Superior Court found guidance in the decision of this Court in *Matter of Pittsburgh*. In that case, we were asked to fashion a rule of confidentiality to protect information and materials in

[6] *Commonwealth v. Ritchie*, 324 Pa.Super 557, 568, 472 A.2d 220, 226 (1984).

[7] 11P.S. §2215.

the files of the Pittsburgh Action Against Rape (PAAR), a center providing counselling and help to victims of rape. The appellant there had asked for the right to inspect communications between the rape counsellors and the victim. While we declined an extension of the common law to create an absolute privilege,[8] we fashioned an *in camera* proceeding wherein defense counsel were permitted an inspection of "only those statements of the complainant contained in the file which bear on the facts of the alleged offense."[9] In the instant case, we are asked for more; we are asked for a review and inspection by counsel of all materials in the possession of CWS, that their relevancy might be determined and their uses in testing credibility ascertained. The sticking place is that the appellant is armed with a statute providing for confidentiality of the files of a child; and while they do not seek an absolute privilege under the statute, they take umbrage that the Superior Court directed:

> . . . counsel should be permitted access to this record in order to argue the relevance of the material in accordance with this decision. Counsel, of course, are permitted access to this record for this purpose only and are otherwise bound by the confidential nature of the material in the record.

Ritchie, supra, at 568, 472 A.2d at 226.

[8] The General Assembly subsequently codified a privilege for sexual assault counsellors by the Act of Dec. 23, 1981, P.L. No. 169 §1, 42 Pa.C.S. §5945.1.

[9] *Matter of Pittsburgh Action Against Rape (Matter of Pittsburgh)*, 494 Pa. 15, 19, 428 A.2d 126, 127-28 (1981).

In ascertaining the intent of the General Assembly we are guided by principals of statutory construction, including that presumption that "[e]very statute shall be construed, if possible, to give effect to all its provisions." 1 Pa.C.S. §1921(a). Moreover, it may be presumed "[t]hat the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth." 1 Pa.C.S. §1922(3). Bearing these principles in mind, we turn to an analysis of the statute.

The Child Protective Services Law was enacted to identify and protect children suffering from abuse and to provide rehabilitative services to such children and their families.[10] In addition to providing procedures concerning the investigation and reporting of abuse cases,[11] the Law has a section providing for the confidentiality of such records, 11 P.S. §2215(a). The confidentiality provision provides that reports made pursuant to the Law shall be confidential, but shall be made available to certain enumerated classes of officials and groups. 11 P.S. §2215(a). Among those to whom such reports may be made available are included, notably, courts of competent jurisdiction pursuant to court order, §2215(a)(5). In addition, access must also be granted to guardians *ad litem*, officials of the Department of Public Welfare, and others.[12] Thus, this confidentiality

[10] See n. 5 *supra*.

[11] 11 P.S. §§2204-2214.

[12] At the time of appellee's trial, Section 2215(a) provided:

> Confidentiality of Records. (a) Except as provided in section 14, reports made pursuant to this act including but not limited to report summaries of child abuse made pursuant to section 6(b) and written reports made pursuant to section 6(c) as well as any other information obtained, reports written or photographs or

(Footnote continued on following page.)

provision, with all its enumerated exceptions, differs from the confidentiality and privilege provisions which the General Assembly has enacted concerning other counsellors, such as licensed psychologists, 42 Pa.C.S. §5944; or school personnel, 42 Pa.C.S. §5945; or sexual assault counsellors, 42 Pa.C.S. §5945.1.

The legislative purpose herein was clearly to create an agency, not only to investigate allegation of child abuse, but to provide care, shelter, and erase where possible the cruel stains upon their innocence. To accomplish this the statute provides for confidentiality and, as well, for exceptions to the confidentiality imposed; all are avenues

(Footnote continued from preceding page.)

> x-rays taken concerning alleged instances of child abuse in the possession of the department, a county public child welfare agency or a child protective service shall be confidential and shall only be made available to:
>
> (1) A duly authorized official of a child protective service in the course of his official duties.
>
> (2) A physician examining or treating a child or the director or a person specifically designated in writing by such director of any hospital or other medical institution where a child is being treated, where the physicians or the director or his designee suspect the child of being an abused child.
>
> (3) A guardian *ad litem* for the child.
>
> (4) A duly authorized official of the department in accordance with department regulations or in accordance with the conduct of a performance audit as authorized by section 20.
>
> (5) A court of competent jurisdiction pursuant to a court order.

Act of Nov. 26, 1975, P.L. 438, No. 124 §15, 11 P.S. §2215.

The law has subsequently been amended, and now provides for an expanded class of officials and groups to whom the reports may be made available, including the attorney general, county commissioners, and law enforcement officials. *See generally*, 11 P.S. §2215(a).

to help. As noted, one of the exceptions is to a court of competent jurisdiction, to which, by court order, all materials in the files of the child are necessarily accessible.

There is, of course, a difference between the types of protection that can be afforded a victim and one accused. The difference in all such considerations is the Sixth Amendment to the Constitution of the United States. There can be no absolute protections that cancel the fundamental mandates of that Amendment; all that can be accomplished is a careful balance between them, the counters always in favor of the Amendment.

The Sixth Amendment provides that an accused, "[i]n all criminal prosecutions . . . shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor."[13] The extent to which a criminal defendant can cross-examine the witnesses testifying against him is controlled by the confrontation clause of the Amendment. The purpose of that clause is to provide an accused with an effective means of challeging the evidence aginst him by testing the recollection and probing the conscience of an adverse witness. *Ohio v. Roberts*, 448 U.S. 56 (1980). Moreover, as the United States Supreme Court stated in *Alford v. United States*, 282 U.S. 687, 692 (1931), and more recently echoed with approval in *Smith v. Illinois*, 390 U.S. 129 (1968):

> It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a

[13] U.S. Constitution, Amendment VI.

> reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

Id. at 132.

The United States Supreme Court has consistently emphasized the role of the truth-seeking process in our system of criminal justice. As it observed in *Dennis v. United States*, 384 U.S. 855, 870 (1966), "disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." Claims of confidentiality or privilege, whatever their basis, necessarily carry with them the possibility of infringing upon that truth-seeking process. As Mr. Chief Justice Burger, writing for a unanimous court, observed of such privileges, "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974).[14] In that case, the Court held that a claim of executive privilege, itself of constitutional dimension, may not prevail as against the need for disclosure there at issue.

[14] *See Matter of Pittsburgh, supra*, at 28, 428 A.2d at 131 (1981).

The United States Supreme Court has also given close attention to state claims of privilege or confidentiality threatening to infringe upon a criminal defendant's federal constitutional rights. The Court has in such cases carefully safeguarded the Sixth Amendment rights of a criminal defendant to present relevant evidence on direct and cross-examination. In *Smith v. Illinois, supra*, the Court held that, notwithstanding a contrary state evidentiary law, the confrontation clause guarantees a defendant the right to cross-examine a prosecution witness as to his real name and address. In *Washington v. Texas*, 388 U.S. 14 (1967), the Court held that the compulsory process clause requires, even as against a contrary state provision, that a defendant be able to present the favorable testimony of a co-defendant. In *Davis v. Alaska*, 415 U.S. 308 (1974), the Court held that the right of confrontation was superior to a state law concerning the confidentiality of juvenile proceedings. The Court expressed concern that the effect of the state's confidentiality provision in that case may have been to allow the testifying witness to give a questionable truthful answer, and to prohibit the defendant from testing the truth of that testimony through the process of cross-examination. *Id.* at 314. That concern, inherent in the whole confidentiality/privilege area, may not be ignored without Sixth Amendment ramifications.

Turning to our own case law, we have set precedent in *Matter of Pittsburgh* that is useful here. In that case, we declined to recognize a common law absolute privilege, just as the General Assembly has declined to do in the instant case by providing exceptions in the statute. In

Matter of Pittsburgh, we gave what we were asked, to wit, inspection of communications between the victim and personnel of PAAR. Now we are asked for the right to inspect the entire file. The rationale for such a request is the same rationale underlying the right granted in *Matter of Pittsburgh*, to inspect prior statements of a victim or witness. In short, as with prior statements, the eye of an advocate may see connection and relevancy in any material gathered from the victim, other witnesses, or circumstances developed by the investigation of a child.[15] *See also, Commonwealth v. Hamm*, 474 Pa. 487, 378 A.2d 1219 (1977). "The search for truth" and the quest for "every man's evidence" so plainly the basis of the Sixth Amendment, and so aptly applied in *Matter of Pittsburgh*, are as applicable to any material as to prior statements. When materials gathered become an arrow of inculpation, the person inculpated has a fundamental constitutional right to examine the provenance of the arrow and he who aims it. Otherwise, the Sixth Amendment can be diluted to mean that one may face his accusers or the substance of the accusation, except when the accuser is shielded by legislative enactment.

Fortunately, we are not required here to find the present statute unconstitutional. The General Assembly has properly excepted courts of competent jurisdiction and has clearly recognized that material in the child's file

[15] This conclusion applies with special strength under the amended provisions of the statute, which would seem to enable the prosecution to gain access to the records, either directly or in the course of investigations by law enforcement officials. *See* n. 13, *supra*, and 11 P.S. §2215(a) generally.

cannot be denied them. Since the use of that which is within the jurisdiction of the court must conform to the fundamental law of the land, the defendant's entitlement to them is therefore to be determined by those Sixth Amendment principles heretofore considered.

Given those principles, we must conclude that the trial court erred in refusing appellee access to the CWS files. As in *Davis, supra*, we find that the Commonwealth's interest in maintaining the confidentiality of these records may not override a defendant's right to effectively confront and cross-examine the witnesses against him. We agree with appellee that it would be absurd to read the statute as providing that the records be made available to a court of competent jurisdiction, while denying any use of them to the litigants in a criminal case before such courts. Notwithstanding the trial court's "finding" that the files contained nothing that would benefit appellee, it is apparent that appellee was denied the opportunity to have the files reviewed with the eyes and the perspective of an advocate. Neither the confidentiality provision of the Child Protective Services Law nor any other argument yet advanced justifies that denial.

Accordingly, we remand the matter to the trial court with instructions that appellee, through his counsel, be granted access to the CWS files.[16] Counsel will then be

[16] As we emphasized in *Matter of Pittsburgh, supra*, at 28-29, 428 A.2d at 132-133, the trial court should take appropriate steps to insure against the improper dissemination of sensitive material gleaned from the files. Such steps might include the fashioning of appropriate protective orders, or conducting certain proceedings *in camera*, mindful always, however, of the right of appellee, through his counsel, to gain access to the information.

permitted to argue to the trial court what use, if any, could have been made of the files in cross-examining the complainant or in presenting other evidence. The Commonwealth may attempt to establish that any error was harmless. *Commonwealth v. Slaughter*, 482 Pa. 538, 394 A.2d 453 (1978). Unless the trial court is convinced that any error was necessarily harmless, it shall vacate judgment of sentence and grant appellee a new trial. *Commonwealth v. Hamm, supra.*

The case is remanded for proceedings consistent with this opinion.

Mr. Justice Larsen files a Dissenting Opinion in which Mr. Justice Hutchinson joins.

Mr. Justice Hutchinson files a Dissenting Opinion.

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

No. 69 W.D. Appeal Dkt. 1984

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

vs.

GEORGE F. RITCHIE,
Appellee.

Appeal from the Order of the Superior Court of February 3, 1984, at No. 137 Pittsburgh, 1981, vacating the Judgment of Sentence entered January 8, 1981, in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, at No. CC7903887A

324 Pa. Super. 557 472 A.2d 220 (1984).

Argued: March 4, 1985 Filed: December 11, 1985

DISSENTING OPINION

JUSTICE ROLF LARSEN

The majority purports to conduct a "careful balance" between a defendant's rights under the Sixth Amendment to the United States Constitution to confront witnesses against him and to compulsory process of witnesses, on the one hand, and the victim's rights and other Commonwealth interests in maintaining the confidentiality of files held by child protective service

agencies in child abuse cases, on the other. However, the majority weights this "careful balance" heavily in favor of the defendant when it declares "the counters always in favor of the [Sixth] Amendment." Majority slip op. at 8. A truly careful balance must consider *all* of the respective interests at stake—not only the need of the defendant for disclosure of the information requested, but also the extent of the infringement of defendant's Sixth Amendment rights, if any, that would result if disclosure were prevented, as well as the need to preserve the confidentiality of the material sought.

The majority's decidedly *un*careful balance exaggerates the first consideration and all but ignores the latter two, and for what? The victim's rights and society's needs are ignored because the defense attorney muttered some nebulous assertions that "there could be possible witnesses disclosed . . . there could be matters in [the Child Welfare Services files] that would be favorable to the defendant." Notes of Testimony (N.T.), Pretrial Conference Hearing on Defendant's Motion for Sanctions, October 23, 1979 at 10. In allowing counsel on remand to scour the entire Child Welfare Service (CWS) file relating to the young victim in this case on no more than the flimsiest assertion that he *might* find *some matters or witnesses* that would be helpful to appellee, the majority has licensed a fishing expedition. Since *any* defense attorney in *any* criminal prosecution can *always* assert that there *may be some matters that could be helpful* to the accused, the majority's decision today does not just undermine the confidentiality of child protective service agency files, it *eliminates it* whenever a case against an accused child abuser is prosecuted.

As I believe the majority's decision violates the Child Protective Services Law (the Act), violates the dictates of principles enunciated by this Court in the *Matter of Pittsburgh Action Against Rape (PAAR)*, 494 Pa. 15, 428 A.2d 126 (1981), and is not compelled by the Sixth Amendment, I emphatically dissent.

The Child Protective Services Law, Act of November 26, 1975, P.L. 438, No. 124, *as amended*, 11 P.S. §§2201-2224 (Supp. 1985) declares that:

> Abused children are in urgent need of an effective child protective service to prevent them from suffering further injury and impairment. *It is the purpose of this act to encourage more complete reporting of suspected child abuse* and to establish in each county a child protective service capable of investigating such reports swiftly and competently, providing protection for children from further abuse *and providing rehabilitative services for children and parents involved* so as to ensure the child's well-being and to preserve and stabilize family life wherever appropriate.

11 P.S. §2202, Findings and purpose. To achieve this purpose, the Act establishes an elaborate mechanism coordinating statewide and local agencies which are required to provide, maintain and where appropriate, expunge comprehensive records and files of child abuse complaints and investigations. 11 P.S. §§2203-2207, 2214. An integral part of this mechanism is the confidentiality of records. Section 2215, Confidentiality of records, provides that "reports made pursuant to this act including but not limited to report summaries of child abuse ... as well as any other information obtained, reports written or photographs or x-rays taken

... in the possession of the department, a county children and youth social service agency or a child protective service *shall be confidential and shall only be made available to ...*" eleven specifically enumerated categories of persons or institutions. 11 P.S. §2215(a). The Act establishes that there is a compelling state interest in maintaining the confidentiality of records *except* in the enumerated instances.

Clearly, the confidentiality of records is not absolute under this legislative scheme. A court of competent jurisdiction is specifically authorized to enter an order of disclosure. 11 P.S. §2215(a)(5). The Act does not set out the parameters of the court's authority in a criminal prosecution to order disclosure of the presumptively confidential files and records to defense counsel upon request; however, this Court's recent decision in the *PAAR* case[1] does establish those parameters, as the Superior Court correctly held.

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[1] In *PAAR*, this Court was called upon to recognize a common law privilege against disclosure of confidential communications between rape crisis counselors and the rape victims, in the absence of any legislation recognizing such privilege. I would have recognized an absolute privilege for such confidential communications. *PAAR*, 494 Pa. at 34-63, 428 A.2d at 135-150 (Larsen, J., dissenting). (Shortly after this Court's decision in *PAAR*, the legislature acted swiftly to enact an absolute privilege for confidential communications between sexual assault counselors and sexual assault victims. 42 Pa.C.S.A. §5945.1.) In the instant case we do not address the issue of whether the common law would or should recognize an absolute privilege for confidential communications between child protective service agency personnel and abused children, for the legislature has spoken and has created a qualified privilege against disclosure of confidential records maintained by child protective service agencies.

Judge Cavanaugh, speaking for the Superior Court panel in the instant case, stated:

> In determining what information appellant is entitled to we are guided by the Pennsylvania Supreme Court's holding in *Matter of Pittsburgh Action Against Rape*, 494 Pa. 15, 428 A.2d 126 (1981). The issue in that case was "the extent to which a court presiding over a rape trial may authorize counsel for the accused seeking to impeach the credibility of the complainant to inspect a rape crisis center file containing communications between the complainant and rape crisis center personnel." 494 Pa. at 19, 428 A.2d at 127. The court there recognized the "societal interest" in promoting communications between rape crisis center personnel and persons seeking the center's assistance, but it also recognized the "compelling societal interest in the truth-seeking function of our system of criminal justice." 494 Pa. at 19, 428 A.2d at 127. In order to protect both interests, the court held that upon defense request, a trial court should authorize defense inspection of that portion of the crisis center's file which reflects verbatim statements of the complainant bearing on the facts of the alleged offense.
>
> . . . [W]e feel that the competing interests involved in *Matter of Pittsburgh Action Against Rape* are similar to those involved here and we are persuaded that the procedure adopted by the Supreme Court there should also be applied in the instant case. We hold, therefore, that appellant is entitled to inspect any portion of CWS' files which reflects statements regarding abuse made by Jeanette to the CWS' worker who examined her.

_____ Pa. Super. at _____, 472 A.2d at 225. The Superior Court also followed the *in camera* procedures and substantive limitations established by this Court in *PAAR*, namely that: (1) only "notes that are verbatim accounts of the complainant's declarations and notes that the complainant has approved as accurately reflecting what she said" are to be inspected by defense counsel; (2) the trial court is to conduct an *in camera* inquiry to determine whether the matters contained in the rape crisis counselor's files are such verbatim only "statements"; (3) after the trial court identifies the verbatim statements of the complainant, the defense counsel is to examine "these statements with an eye toward the utility or permissibility of their ultimate use at trial"; and (4) the defense counsel need not be given access to all statements in the file—rather, the court is to withhold from defense inspection "statements contained in a . . . file [that] have no bearing whatsoever on the facts of the alleged offense and [that] relate instead only to . . . counselling services. . . ." 494 Pa. at 28-29, 428 A.2d at 132. The majority in *PAAR*, therefore, did conduct a "careful balance" of competing interests, including the Sixth Amendment right to confront adverse witnesses, and limited defense counsel's access to the rape crisis counselor's files as outlined above. Defense counsel was not permitted to rummage through the files for any "matters that could be helpful", but was only permitted to inspect statements which defense counsel had specifically requested and which the trial court identified as substantially verbatim accounts of the victim, an item (prior statments) that has traditionally been available and highly beneficial to the defendant for use in cross-examining a witness. The need by the

defendant for such specific information contained in PAAR's files was felt to outweigh the victim's and Commonwealth's interests in maintaining confidentiality, but the *in camera* procedures set forth in *PAAR* were carefully crafted to tread as lightly as possible upon that confidentiality and to extract only that specific information requested by counsel and historically recognized as necessary and beneficial in the cross-examining of witnesses.

Nevertheless, the majority discards *PAAR*'s "careful balance", and allows defense counsel unfettered access to the CWS files simply because "[n]ow we are asked for the right to inspect the entire file." Majority slip op. at 11. In the majority's view, the Sixth Amendment "counters" (the right to confront adverse witnesses and to compulsory process of witnesses) are so heavy as to require unrestricted access by a defendant to scrutinize an entire confidential file in the possession of a child protective service agency *merely* because the defendant has vaguely suggested that there may be material in there that *could be* helpful. I do not believe the Sixth Amendment requires such intrusion into records that the General Assembly has seen fit to cloak with a privilege of confidentiality.

As the United States Supreme Court most recently stated:

> " 'The main and essential purpose of confrontation is to secure for the oppenent the opportunity of cross-examination.' " [Davis v. Alaska, 415 U.S. 308 (1941)] at 315-316 (quoting 5 J.Wigmore, Evidence §1395, p. 123 (3d ed. 1940) (emphasis in original)). Generally speaking, the Confrontation Clause

> guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. . . . This conclusion is confirmed by the fact that the assurances of reliability our cases have found in the right of cross-examination are fully satisfied in cases such as this one . . .: the factfinder can observe the witness' demeanor under cross-examination, and the witness is testifying under oath and in the presence of the accused.

Delaware v. Fensterer, No. 85-214, 38 Cr.L. 4067, per curiam (November 4, 1985) (failure of expert witness to recall the method of scientific analysis he used to reach his opinion did not deprive defendant of his right to confront and to effectively cross-examine adverse witnesses; State Supreme Court summarily reversed).

The constitutional rights to confront adverse witnesses and to compulsory process, both federal and state, are *not absolute*. As this Court unanimously stated in *Commonwealth v. Allen*, 501 Pa. 525, 462 A.2d 624 (1983):

> It is clear that under both our state and federal constitutions, a criminal defendant has a right of compulsory process to obtain witnesses in his favor. Pa. Const. art. I §9. *See Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). However, *this right is qualified to the extent of existing testimonial privileges of witnesses, including the privilege against self incrimination. Id.* at 23, n. 21, 87 S.Ct. at 1925, n. 21.

Id. at 531, 462 A.2d at 627 (defendant's right to compulsory process not abridged by potential defense witness' assertion of privilege against self-incrimination).

Or, as the United States Supreme Court phrased it in *United States v. Nixon*, 418 U.S. 683 (1974):

> To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.
>
> Only recently the Court restated the ancient proposition of law, albeit in the context of a grand jury inquiry rather than a trial,
>
> "that 'the public . . . has a right to every man's evidence,' *except for those persons protected by a constitutional, common-law, or statutory privilege. . . .*"

Id. at 709-10 (citations omitted). *See also Davis v. Alaska*, 415 U.S. 308 (1974) (Court weighed competing interests to accommodate "tension between the right of confrontation and the state's policy of protecting the witness with a juvenile record"); *Ohio v. Roberts*, 448 U.S. 56 (1980) (right to confront witness not absolute; where witness unavailable, preliminary hearing testimony of that witness may be introduced if it bears sufficient indicia of reliability); *Smith v. Illinois*, 390 U.S. 129 (1968) (right of cross-examination fundamental to right of confrontation, but cross-examination is not unlimited and may be restricted if questioning goes beyond the bounds of proper cross-examination). In *McCray v. Illinois*, 386 U.S. 300 (1967), the Court held that the privilege against disclosure of an informer's identity did not violate the defendant's right to confront adverse witnesses under the circumstances, stating "no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest

in protecting the flow of information against the individual's right to prepare his defense." *See generally* Annot., *Federal Constitutional Right to Confront Witnesses—Supreme Court Cases*, 23 L.Ed.2d 853 (1970). Accordingly, when a defendant asserts the Sixth Amendment right to confront adverse witnesses or to compulsory process of witnesses against a claim of testimonial privilege, that "careful balance" must take place which will "depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the [information sought], and other relevant factors." *McCray v. Illinois, supra* at 386 U.S. 310, *quoting Rovario v. United States*, 353 U.S. 53, 61 (1957).

Since the particular circumstances of each case are critical to this balance, it is important to identify just what we are dealing with in this case—and what we are not. I begin with what we are not dealing with.

We do not deal with exculpatory material which the defendant has requested and which is in the possession of the Commonwealth. Although the Act authorizes disclosure of child protective service agency files to law enforcement officials investigating cases of child abuse, 11 P.S. §2215 (9) and (10), there is no indication that any law enforcement officials ever had access to the CWS files in question. Moreover, it is clear from the record that the prosecution did not have any information from the CWS records in its possession nor did the Commonwealth use CWS records in any way to prosecute appellee.

Defense counsel filed a motion and application for discovery pursuant to Pa.R.Crim.P. Rule 305. The motion tracked the language of Rule 305 and included requests for "any evidence favorable to the accused . . . in the possession or control of the attorney for the Commonwealth" and for "results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph . . . or other physical or mental examinations of Jeanette Biles." The court found that the Commonwealth had complied with the discovery request and had furnished appellee with all relevant information in its possession, except the court ordered the Commonwealth to provide defense counsel with all medical records it had in its possession. This order and finding was not challenged, and appellee does not now claim that the Commonwealth had in its possession any evidence or information gleaned from the CWS files. The testimony and argument presented at the *in camera* proceeding also supports the conclusion that the Commonwealth did not possess or control the CWS records.

In discussing the appellee's need for complete access to CWS's files in this case, the majority offers this metaphor: "When materials gathered become an arrow of inculpation, the person inculpated has a fundamental constitutional right to examine the provenance of the arrow and he who aims it." Majority slip op. at 11. Since the "arrows of inculpation" were never in the Commonwealth's possession, nor used against him in the criminal proceedings, this metaphor must be viewed as a melodramatic *non sequitur*, entertaining, perhaps, but having no place in the "careful balance" that we must perform to resolve the tension between the appellee's

Sixth Amendment rights *in this case* versus the victim's and state's interests in preserving the confidentiality of the CWS files.

Neither do we deal, in the instant case, with the "classic" Sixth Amendment right to confront or to compulsory process situations, *i.e.*, where a prosecution witness is unavailable and the prosecution seeks to introduce that witness' prior testimony or statements which will obviously not be subject to cross-examination, or where the state asserts some testimonial privilege or other interest to prevent a defendant from compelling a witness to appear as a defense witness. In these "classic" situations the defendant's Sixth Amendment rights are at their fullest extension—yet the rights are still not recognized as absolute and still must be balanced against competing state's and victim's interest. *See, e.g., Ohio v. Roberts, supra; Pointer v. Texas*, 380 U.S. 400 (1965); *Barber v. Page*, 390 U.S. 719 (1968); *Washington v. Texas*, 388 U.S. 14 (1967); *Commonwealth v. Allen, supra.*

Having seen what we do not have in this case, let us examine the factual matrix which does present itself to us. Defense counsel sought access to all information contained in presumptively confidential records of a child protective service agency, CWS, which information was arguably relevant to the criminal proceeding.[2] In an

[2] While I find it unlikely that any of the information in the CWS file is relevant to issues raised in the trial, I accept the Superior Court's explanation as to its *arguable* relevance. That court stated "that in view of the fact that Jeannette was permitted to testify that the sexual abuse had been going on for about four years, statements made by her regarding abuse at the time of the CWS examination are at least potentially relevant."

effort to acquire this information, counsel subpoenaed CWS and filed a pretrial motion for sanctions requesting the court to order CWS to allow counsel access to its records. At the pretrial conference hearing on the motion for sanctions, defense counsel asserted three justifications for disclosure. The first was that counsel believed the files would contain a medical report by a doctor who had allegedly examined the victim in September, 1978. The testimony at this hearing and at trial indicates that a medical examination did take place in September, 1978, but it did not seem to be an examination for sexual abuse. Counsel made no argument as to how this medical examination might have been helpful to the defense. Nevertheless, the court examined the CWS files and confirmed a CWS representative's statement that there was no medical report of a 1978 examination in the file. N.T. at 5, 11.

The only other reasons advanced by defense counsel to support his request for disclosure was that there "could be defense witnesses disclosed by their records there. There could be matters in there that would be favorable to the defendant." N.T. at 10. Asked by the court what "kind of witnesses" might be found in the CWS file, defense counsel replied "I don't know. Could be lots of witnesses." N.T. at 10. Unimpressed with counsel's "could be-s," the court declined to further examine the CWS records and denied the motion for sanctions.

At trial, appellee's accuser—his thirteen year-old daughter whom he had raped and abused for several years—took the witness stand and testified as to appellee's deranged atrocities. The victim was subjected

to vigorous and extensive cross-examination by defense counsel. A review of that cross-examination demonstrates that it was broad and unrestricted, except for certain instances when questioning strayed too far off course and the court, in its discretion, refused to allow some questions relating to clearly irrelevant matters, such as whether the victim "had boyfriends." *See, e.g.* N.T. Trial, November 7, 1979 at 81-82, 105-106. Counsel was permitted to cross-examine the victim at length about the incident of September, 1978. The victim testified that a lady from CWS visited her in September, 1978 and asked her some questions about anyone ever hitting her. A complaint had been made by an unidentified source. Appellee was present in another room of their residence when the CWS investigator questioned the victim. The victim further testified that she had been examined by a doctor in September, 1978, that her father, appellee, had taken her to the doctor's office, and that the victim had not made any complaints to the doctor at that time. N.T. Trial, November 7, 1979 at 56-124.

It is difficult to imagine, under all of the circumstances, how appellee's rights to confront adverse witnesses and to compulsory process were in *any way* infringed by the court's refusal to compel disclosure of the CWS files. Given the undeniably compelling interests of the victim and the state in preserving the confidentiality of child protective service files as established by the Act, given the minimal and highly speculative benefits that appellee might have gained had he been given access to the CWS records, and given appellee's vague assertions to the court that there "could

be" some matters favorable to appellee in those records, the careful balance of competing interests resoundingly tips in favor of non-disclosure and preservation of confidentiality.

None of the cases relied upon by appellee or by the majority require disclosure in this case. Only one case discussed by the majority even remotely resembles the factual circumstances of the instant case. In *Davis v. Alaska, supra*, the critical witness in the prosecution of Davis for burglary was Richard Green, a 17 year old who himself had a juvenile record of burglary. Green had testified for the prosecution that he had found the stolen cash safe near his property and reported it to the police. He also identified Davis as a man he had seen in the vicinity the night before he discovered the stolen property. Defense counsel sought to impeach the witness by introducing evidence of his juvenile burglary record and his probationary status, not to impeach his credibility generally but to cast the suspicion for the burglary of the safe to Green himself, and to indicate a motive for testifying against Davis. The trial court refused to allow defense counsel to introduce evidence of the witness' juvenile record or to question Green about that record, relying on Alaska statutory law prohibiting disclosure of juvenile records.

The United States Supreme Court conducted a careful balance in *Davis*, and concluded that, "[i]n this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender." 415 U.S. at 319. The balance tipped in favor of disclosure in *Davis* because the defendant's need and request for the information sought was specific and would have been

quite valuable to the defendant in helping to establish his defense, to demonstrate the witness' motivation for testifying and possibly lying, and to cast the witness as a possible suspect in the burglary. Refusing to permit defense counsel to cross-examine the witness as to his juvenile record for burglary completely foreclosed an important line of defense.

In the United States Supreme Court's recent *per curiam* decision in Delaware v. Fensterer, *supra*, the Court explained its decision in Davis v. Alaska, and delineated two broad categories of Confrontation Clause cases, stating:

> This Court's Confrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination. The first category reflects the Court's longstanding recognition that the "literal right to 'confront' the witness at the time of trial . . . forms the core of the values furthered by the Confrontation Clause." (citation omitted) . . .
>
> The second category of cases is exemplified by Davis v. Alaska, 415 U.S. 308, 318 (1974), in which, although some cross-examination of a prosecution witness was allowed, the trial court did not permit defense counsel to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." As the Court stated in Davis, supra, at 315, "[c]onfrontation means more than being allowed to confront the witness physically." Consequently, in Davis, as in other cases involving trial court

restrictions on the scope of cross-examination, the Court has recognized that Confrontation Clause questions will arise because such restrictions may "effectively ... emasculate the right of cross-examination itself." Smith v. Illinois, 390 U.S. 129, 131 (1968).

This case falls in neither category. It is outside the first category, because the State made no attempt to introduce an out-of-court statement by Agent Robillard for any purpose, let alone as hearsay. Therefore, the restrictions the Confrontation Clause places on "the range of admissible hearsay," ... are not called into play.

The second category is also inapplicable here, for the trial court did not limit the scope or nature of defense counsel's cross-examination in any way.

38 Cr.L. 4068.

As in Delaware v. Fensterer, this case falls into neither category. We have already seen that this case is not in the first category, where the state attempts to introduce out-of-court statements against a defendant. Nor does this case fall into the Davis v. Alaska—restrictive cross-examination category.

In stark contrast to the setting in *Davis* is the setting presented in this case. As opposed to the particularized need for disclosure demonstrated in *Davis*, appellee here has suggested that the CWS files *could have* some favorable matters "in there." Counsel did not know what witnesses might be "in there," but there "could be lots." Moreover, counsel in this case was not restricted in any way from pursuing the matter of the September, 1978 incident on cross-examination of the victim. That cross-examination elicited from the victim all of the

information that counsel ever indicated *might be* found in the CWS files (*i.e.*, that she had been examined by a doctor in 1978 after a CWS worker had visited her upon an anonymous complaint, and that she had not made any complaints of abuse to the doctor). Under these circumstances, neither *Davis* nor any other Sixth Amendment cases or considerations require defense access to the CWS files.

Under the circumstances, I would hold that the CWS files are confidential and that the court properly denied defense counsel access to the file. However, given this Court's careful accommodation of competing interests in *PAAR*, and giving appellee the benefit of the doubt that "there could be matters in there that would be favorable" encompassed a request for verbatim statements to which he would be entitled under *PAAR*, I would affirm the Superior Court's *limited* remand to the court of common pleas. As in *PAAR*, if the CWS records contain such verbatim statements, defense counsel should be allowed to review those statements *only*. If no such statements exist, defense counsel would not be entitled to review *any* information in the file.

I would also instruct the lower court to consider the applicability of the unqualified privilege for confidential communications to sexual assault counselors that was enacted by the legislature in 1981 in response to this Court's decision in *PAAR*. 42 Pa.C.S.A. §5945.1. (*See* note 1 *supra*.) Obviously, a child protective service agency and its counselors will function as a "rape crisis center" and "sexual assault counselors", as those terms are defined by §5945.1(a), where the child has been sexually abused. Accordingly, "confidential

communications" made by the child to the counselor in such circumstances will be protected by this privilege which offers greater protection than the privilege provided in the Child Protective Services Law.

There is no question that appellee's June, 1979 rape of his daughter was a sexual assault. However, we cannot determine on the record before us whether the September, 1978 incident involved sexual assault, or whether the CWS files which appellee sought to inspect related to that incident or any incident(s) of sexual assault. The indications that do appear of record are to the contrary. I would instruct the lower court that, if the CWS files in fact pertain to incidents of sexual assault, then the unqualified privilege against disclosure of confidential communications would apply if the terms and provisions of §5945.1 are otherwise applicable.

Finally, I must emphasize my distress over the probable impact of the majority's decision. In allowing unfettered access to defense attorneys to fish through the files of child protective service agencies, counselors, guardians and parents will not be able to comfort the innocent and abused young victims with the security that the information they tell the agency personnel in confidence will not be scrutinized by their abusers. Nor will the confidentiality of the identity of those reporting suspected child abuse—a critical factor to the success of the Child Protective Services Law—be guaranteed; thus, the neighbor, relative, friend or acquaintance who suspects or witnesses child abuse might well decline to report such abuse if he or she knows that the abuser will be able to discover his or her identify so easily.

Permitting review of these records on no more than the barest assertion that they "might be helpful" destroys the confidentiality of the records and thoroughly frustrates the stated legislative purposes "to encourage more complete reporting of suspected child abuse and to . . . provid[e] rehabilitative services for children and parents involved so as to ensure the child's well-being and to preserve and stabilize family life wherever appropriate." 11 P.S. §2202. I urge the legislature to act swiftly to shore up the confidentiality provisions that have been substantially discarded by the majority today.

Mr. Justice Hutchinson joins in this dissenting opinion.

Appendix A—Opinion of the Supreme Court of Pennsylvania, Western District.

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

No. 69 Western District Appeal Docket 1984

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

vs.

GEORGE F. RITCHIE,
Appellee.

Appeal from the Order of the Superior Court of February 3, 1984, at No. 137 Pittsburgh, 1981, vacating the Judgment of Sentence entered January 8, 1981, in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, at No. CC7903887A

324 Pa. Super. 557 472 A.2d 220 (1984).

Argued: March 4, 1985 Filed: December 11, 1985

DISSENTING OPINION

HUTCHINSON, *J.*

I join the dissenting opinion of Mr. Justice Larsen. However, on remand I would instruct the lower court to consider the application of the unqualified statutory privilege of sexual assault counselors for victim's communications to them, 42 Pa.C.S. §5945.1, to these facts, as affected by appellee's right of confrontation under the Sixth Amendment of the United States Constitution.

APPENDIX B

Opinion of the Superior Court of Pennsylvania

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 137 Pittsburgh, 1981

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

vs.

GEORGE F. RITCHIE,
Appellant.

Appeal from Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Allegheny County, at No. 790-3887A.

Before: CAVANAUGH, BROSKY and MONTGOMERY, *JJ.*

Filed: February 3, 1984

OPINION BY CAVANAUGH, *J.*:

Appellant George Ritchie was tried by a jury and convicted of rape, involuntary deviate sexual intercourse, incest, and corruption of minors. Post-verdict motions were denied and appellant was sentenced to a term of three to ten years incarceration. The instant appeal followed. For the reasons discussed below, we now vacate the judgment of sentence and remand for further proceedings.

The instant charges arose out of an incident involving appellant's daughter, Jeanette, who was thirteen at the time of trial. Jeanette testified that she was watching television on the evening of June 11, 1979, when appellant entered the room and demanded that she perform oral sex on him "or else" (N.T. at 24). Jeanette testified that based on past experience, she knew that the "or else" meant that if she did not do as appellant requested, she would be hit. Appellant forcibly removed Jeanette's clothes when she refused to do so and then forced her to commit oral intercourse. He then attempted to have normal intercourse with Jeanette, which caused pain to her. When the incident was over, appellant told Jeanette to go to bed.

Several days later, Jeanette told her cousin about sexual contacts between herself and appellant and the cousin told her mother, Jeanette's aunt. The aunt took Jeanette to the police station.

Appellant denied that he ever sexually molested Jeanette.

One of the claims raised by appellant is that the evidence was insufficient to convict appellant of rape. Specifically, appellant alleges that the Commonwealth failed to establish penetration. In reviewing the sufficiency of evidence, we must accept as true all the evidence, and the reasonable inferences therefrom, upon which the factfinder could have based its verdict and then ask whether that evidence, viewed in a light most favorable to the Commonwealth as verdict winner, was sufficient to prove guilt beyond a reasonable doubt.

Commonwealth v. Parker, 494 Pa. 196, 198, 431 A.2d 216, 217 (1981); *Commonwealth v. Stockard*, 489 Pa. 209, 212-13, 413 A.2d 1088, 1090 (1980).

We stated in the recent case of *Commonwealth v. Ortiz*, _____ Pa. Super. _____, 457 A.2d 559, 560-61 (1983), that:

> [i]t is quite clear ... that the definition of "sexual intercourse" found at [18 Pa.C.S.A. §3101] does not specify "penetration of the vagina." but instead specifies "some penetration however slight." ... *Commonwealth v. Bowes*, 166 Pa. Super. 625, 74 A.2d 795 (1950) ... is the only Pennsylvania appellate case specifically delineating what penetration means in this context. That case stated that entrance in the labia is sufficient: "To constitute the crimes of rape there must be penetration, *however slight*. (Res in re, but entrance in the labia sufficient: 44 Am. Jur., Rape, §3)." *Id.* at 628, 74 A.2d at 796 (emphasis in original). We therefore will not hold that a finding of penetration of the vagina is necessary for the jury to find "penetration however slight ...." ... [P]enetration of the vagina, in essence the farther reaches of the female genitalia, is not necessary to find penetration under Section 3101.

It is clear that the testimony of the victim alone can be sufficient to establish penetration so as to sustain a conviction of rape. *Commonwealth v. Crider*, 240 Pa. Super. 403, 361 A.2d 352 (1976). Jeanette testified that she was lying on her back on the floor and appellant was lying on top of her and that he tried to push his penis

into her vagina. This caused her pain and appellant finally desisted and told Jeanette to go to bed. We feel that Jeanette's testimony is sufficient to support a finding of penetration as defined in *Commonwealth v. Ortiz, supra.*[1]

Appellant next claims that the trial court erred in allowing Jeanette to testify that appellant had been sexually molesting her three or four times a week for a period of about four years, in spite of the fact that she could not remember the exact dates of any attack other than the one on June 11, 1979.

It is clear that "in a prosecution for incest it is 'competent for the commonwealth to introduce evidence of illicit relations between the parties prior to the commission of the specific offense laid in the indictment.' " *Commonwealth v. Buser,* 277 Pa. Super. 451, 455, 419 A.2d 1233, 1235 (1980) (quoting *Commonwealth v. Bell,* 166 Pa. 405, 411, 31 A. 123, 123 (1895), and *Commonwealth v. Leppard,* 271 Pa. Super. 317, 319, 413 A.2d 424, 425 (1979)). Such testimony is relevant to "show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial." *Commonwealth v. Buser,* 277 Pa. Super. at 455, 419 A.2d at 1235, (quoting McCormick on Evidence §190 at 449 (Cleary ed.1972)). Nor does the fact that Jeanette could not remember the exact dates of

[1] We note that Jeanette's testimony regarding oral intercourse would have sustained a verdict of rape as defined at 18 Pa.C.S.A. §§3121 and 3101. However, the court in the instant case, pursuant to the Commonwealth request, charged the jury that in order to find appellant guilty of rape, they must find "that there was some penetration, however slight, of the sexual organ of the female by the male." (N.T. 11-9-79 at 348).

previous sexual attacks render the testimony inadmissible. *Commonwealth v. Niemetz,* 282 Pa. Super. 431, 422 A.2d 1369 (1980).

Appellant admits that *Commonwealth v. Leppard, supra,* and *Commonwealth v. Buser, supra,* specifically hold that evidence such as that in question is admissible but he contends that these holdings violate his right to confront his accuser, and that they should therefore not be followed. We are not persuaded by his argument and decline to overrule the precedent. There was, therefore, no error in admitting Jeanette's testimony regarding prior sexual attacks.

Another claim raised by appellant is that the trial court erred in refusing to permit him to enter into evidence certain letters written by Jeanette to other individuals. The letters were offered for the purpose of showing that Jeanette freely communicated with persons outside her home and failed to mention either the sexual attacks by her father or the fear she allegedly had of him. Appellant hoped to discredit Jeanette's testimony by raising a question as to why she waited so long to report the sexual attacks which had allegedly been occurring for several years. The trial court held that the letters were not relevant, and therefore refused to admit them in evidence.

"Any analysis of the admissibility of a particular type of evidence must start with a threshold inquiry as to its relevance and probative value." *Commonwealth v. Walzack,* 468 Pa. 210, 218, 360 A.2d 914, 918 (1976).

> Determination of the relevancy of evidence offered at trial requires a two-step analysis. It must be determined first if the inference sought to be raised

by the evidence bears upon a matter in issue in the case and, second, whether the evidence "renders the desired inference more probable than it would be without the evidence." *Commonwealth v. Stewart*, 461 Pa. 274, 278, 336 A.2d 282, 284 (1975) (citations omitted).

The Commonwealth did not contend that Jeanette had no opportunity to report the sexual molestation at an earlier date or that appellant had prevented her from making any complaint. Jeanette freely admitted that she had numerous and frequent contacts with members of her family and friends during the period of time in question. She explained that she was afraid of her father and stated that she never would have gone to the police if she had not been taken to them by her aunt.

Since Jeanette had already testified as to her freedom to contact others, admission of the letters in question would not have made the desired inference "more probable than it would be without the evidence." McCormick on Evidence §185 (Cleary ed. 1972). Thus there was no abuse of discretion on the part of the trial court in refusing to admit the letters.

Appellant also claims that the trial court erred in permitting the Commonwealth to introduce testimony contrary to Jeanette's birth certificate, the effect of which was to bastardize her, in order to support its charge of incest. Helen Ritchie, Jeanette's mother, was permitted to testify that appellant George Ritchie, and not Thomas Bills, whose name appears on the birth certificate, was the natural father of Jeanette. Ms. Ritchie testified that although she was still married to

Thomas Bills when Jeanette was born, she had not had sexual relations with him for three years prior to Jeanette's birth. She further testified that appellant was the only man with whom she had had sexual relations around the time of Jeanette's conception and that appellant had admitted not only to her but to the Welfare Department, that he was Jeanette's father. Mr. Bills testified that he had not had sexual relations with Jeanette's mother for at least a year and a half prior to Jeanette's birth, and that appellant had admitted to him that he (appellant) was Jeanette's father. Ms. Ritchie married appellant after obtaining a divorce from Mr. Bills.

Appellant claims that the testimony outlined above should not have been permitted, claiming that "no authority exists for allowing a child to be bastardized in order to prove the crime of incest." (Appellant's Brief at 25).

Appellant ignores the holding of *Commonwealth ex rel. Leider v. Leider*, 434 Pa. 293, 254 A.2d 306 (1969), which says that a child is *not* bastardized by the testimony of the mother and her husband as to their non-access to each other at the time of conception in cases where the alleged father later married the mother, thus legitimizing the child. The testimony in the instant case is clearly admissible under the holding in *Leider*. *See also, Commonwealth ex rel. Savruk v. Derby*, 235 Pa. Super. 560, 344 A.2d 624 (1975); *Commonwealth ex rel. Meta v. Cinello*, 218 Pa. Super. 371, 280 A.2d 420 (1971).

Finally, appellant claims that the trial court erred in refusing to order Child Welfare Services (hereinafter referred to as CWS) to comply with appellant's subpoena

for files pertaining to an examination of the prosecutrix which occurred in 1978. He claims that his sixth amendment right to confrontation is superior to any claim the state might have regarding the need to maintain the confidentiality of the records.

In September, 1978, Child Welfare Services conducted an examination of Jeanette and her two younger brothers at the Ritchie home. The examination was prompted by a report of child abuse from an unidentified source and was CWS' only contact with Jeanette. Appellant's trial counsel served a subpoena upon CWS requesting that they turn over to him any records pertaining to Jeanette. CWS refused to produce the records based on a statutory provision regarding the confidentially of the records.[2] Appellant's motion for sanctions was denied after the court reviewed the records *in camera* and found that "no medical records are being held by Child Welfare Services that would be of benefit to the defendant in the case." Appellant contends that his counsel should have been permitted to review the files for himself, or that, at a minimum, he should have been granted access to any verbatim statements made by the prosecutrix contained in the file.

Appellant's right of confrontation must be weighed against the state's interest in maintaining the confidentiality of the information in the records. *David v. Alaska*, 415 U.S. 308, 319 (1974). We agree that the need

[2] 11 P.S. §2215(a) states that reports made pursuant to the Child Protective Services Law shall be confidential and shall only be made available to certain enumerated persons or agencies. Under §2215(a)(5), the reports shall be made available to a court of competent jurisdiction pursuant to a court order.

for confidentiality in this case must, to a certain extent, yield to appellant's right of confrontation. But we do not feel that appellant is entitled to examine the entire file kept by CWS. We feel, for instance, that the state's interest in maintaining confidentiality regarding the source of the complaint which triggered CWS' involvement outweighs appellant's right to obtain that specific information which does not appear to be relevant to the instant trial.

In determining what information appellant is entitled to we are guided by the Pennsylvania Supreme Court's holding in *Matter of Pittsburgh Action Against Rape*, 494 Pa. 15, 428 A.2d 126 (1981). The issue in that case was "the extent to which a court presiding over a rape trial may authorize counsel for the accused seeking to impeach the credibility of the complainant to inspect a rape crisis center file containing communications between the complainant and rape crisis center personnel." 494 Pa. at 19, 428 A.2d at 127. The court there recognized the "societal interest" in promoting communications between rape crisis center personnel and persons seeking the center's assistance, but it also recognized the "compelling societal interest in the truth-seeking function of our system of criminal justice." 494 Pa. at 19, 428 A.2d at 127. In order to protect both interests, the court held that upon defense request, a trial court should authorize defense inspection of that portion of the crisis center's file which reflects verbatim statements of the complainant bearing on the facts of the alleged offense.

We realize that the holding in *Matter of Pittsburgh Action Against Rape* is not directly on point. The issue there was whether the common law of Pennsylvania should be expanded to create an absolute privilege for all communications between rape crisis center personnel and their clients. It was not argued that any statute accorded a privileged status to such communications[3] or directed that records relating to such communications be kept confidential. In the instant case, there *is* a statute directing that the records at issue be kept confidential, but there is no claim of an absolute privilege of communications between CWS personnel and the children they investigate. Still, we feel that the competing interests involved in *Matter of Pittsburgh Action Against Rape*, are similar to those involved here and we are persuaded that the procedure adopted by the Supreme Court there should also be applied in the instant case. We hold, therefore, that appellant is entitled to inspect any portion of CWS' files which reflects statements regarding abuse made by Jeanette to the CWS' worker who examined her.[4]

The procedure employed by the trial court in the instant case was not sufficient to protect appellant's rights in spite of the court's "finding" that the records

[3] We note that subsequent to the decision in *Matter of Pittsburgh Action Against Rape*, a statute was enacted granting rape counseling communications an absolute privilege. 42 Pa.C.S.A. §5945.

[4] The CWS examination occurred over a year prior to the incident which is the basis of the charges in the instant case, and it might therefore be argued that anything contained in the file is irrelevant to this trial. We feel, however, that in view of the fact that Jeanette was permitted to testify that the sexual abuse had been going on for about four years, statements made by her regarding abuse at the time of the CWS examination are at least potentially relevant.

contained nothing that would benefit appellant. As the Supreme Court stated in *Matter of Pittsburgh Action Against Rape*:

> [i]t is not for the trial court to review these statements with an eye toward the utility or permissibility of their ultimate use at trial. . . . "Prior statements may, by themselves or in conjunction with other information known by the defense, open up valuable lines of cross-examination for the defense, even though the statements involve matters not directly relating to a witness' direct testimony . . . . 'Whether the statements of the prosecution's witnesses would have been helpful to the defense is not a question to be determined by the prosecution or by the trial court. They would not be reading the statements with the eyes of a trial advocate engaged in defending a client. Matters contained in a witness's statement may appear innocuous to some, but have great significance to counsel viewing the statements from the perspective of an advocate for the accused about to cross-examine a witness.' "

494 Pa. 15, 28-29, 428 A.2d at 132 (citations omitted).

We do not have the CWS records before us and therefore we are unable to determine whether they contain any statements to which appellant is entitled. We must therefore remand the case for further proceedings. We direct the trial court to review the CWS records *in camera* to determine whether they contain any statements made by Jeanette regarding abuse. If the court determines that there are no such statements, then

it should reinstate the judgment of sentence. If the records do contain such statements they should be made available to appellant's counsel, who should then be given an opportunity to argue to the court that the statements could have been used to discredit Jeanette's testimony. *Commonwealth v. Slaughter*, 482 Pa. 538, 394 A.2d 453 (1978). The Commonwealth should be permitted an opportunity to argue that the court's failure to provide appellant's counsel with the statements prior to trial was harmless error. If the court is not convinced that the statements were irrelevant or that any error was harmless, then it should grant appellant a new trial. *Commonwealth v. Hamm*, 474 Pa. 487, 378 A.2d 1219 (1977). Following the court's ruling, either party may file an appropriate appeal.

In order to preserve the parties' rights to effective counsel and allow appellate review, the entire record reviewed by the court at its *in camera* proceeding should be preserved for appeal. This record may be sealed in order to protect its confidentiality. In addition, counsel should be permitted access to this record in order to argue the relevance of the material in accordance with this decision. Counsel, of course, are permitted access to this record for this purpose only and are otherwise bound by the confidential nature of the material in the record.

Judgment of sentence is vacated and case remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

Montgomery, *J.* files concurring and dissenting statement.

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 137 Pittsburgh, 1981

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

vs.

GEORGE F. RITCHIE,
Appellant.

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Allegheny County, at No, 790-3887A.

Before: CAVANAUGH, BROSKY and MONTGOMERY, *JJ.*

Filed: February 3, 1984

CONCURRING AND DISSENTING STATEMENT BY MONTGOMERY, *J.*

I agree with the majority that appellant is entitled to direct statements made by the victim which appear in the CWS files. I would make a distinction not made by the majority, however, and limit appellant to only those statements bearing on the offense in question, that is, sexual abuse, rather than permitting inspection and use of statements regarding "abuse" in general.

APPENDIX C

Judgment Dated December 11, 1985

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

vs.

GEORGE F. RITCHIE,
Appellee.

JUDGMENT

December 11, 1985

ON CONSIDERATION WHEREOF, it is now ordered and adjudged by this Court that the judgment of the SUPERIOR COURT OF PENNSYLVANIA by, and the same is, AFFIRMED and CASE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.

APPENDIX D

Order Dated February 3, 1984

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 137 Pittsburgh, 1981

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

vs.

GEORGE F. RITCHIE,
Appellee.

ORDER

AND NOW, this 3rd day of February, 1984, it is ordered as follows: JUDGMENT vacated and lower court directed to proceed in accordance with opinion filed herewith.

5/22, P

85-1347

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

GEORGE F. RITCHIE,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

LESTER G. NAUHAUS
PUBLIC DEFENDER
PA I.D. #00885

JOHN H. CORBETT, JR.
CHIEF-APPELLATE DIVISION
PA I.D. #09994

OFFICE OF THE PUBLIC DEFENDER
1520 Penn Avenue
Pittsburgh, PA 15222

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE PETITION SHOULD BE DENIED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION?

II. WHETHER THE SUPREME COURT OF PENNSYLVANIA HAS CORRECTLY CONSTRUED THE APPLICATION OF THE CONFRONTATION AND COMPULSORY PROCESS CLAUSES OF THE SIXTH AMENDMENT TO THAT STATE'S LIMITED CONFIDENTIALITY STATUTE IN QUESTION?

COUNTER STATEMENT OF THE CASE

In so far as the Statement of the Case submitted by the petitioner accurately reflects selected portions of the procedural and factual histories of the case, the respondent, George F. Ritchie, would agree, but would contest the legal interpretation petitioner espouses for the opinions rendered in this case by the Superior Court of Pennsylvania, Commonwealth v. Ritchie, 324 Pa. Super. 557, 472 A.2d 220 (1984) (Petitioner's Appendix B) and the Supreme Court of Pennsylvania, Commonwealth v. Ritchie, ___ Pa. ___, 502 A.2d 148 (1985) (Petitioner's Appendix A). At no time did the highest court of Pennsylvania declare the state confidentiality statute unconstitutional nor did it deny to Mr. Ritchie his claim of compulsory process and right of confrontation under the Sixth Amendment. Instead, the Supreme Court of Pennsylvania construed the state statute in such a manner as to pass constitutional muster, and in doing so, stated the following in passing:

> Fortunately, we are not required here to find the present statute unconstitutional. The General Assembly has properly excepted courts of competent jurisdiction and has clearly recognized that material in the child's file cannot be denied them. Since the use of that which is within the jurisdiction of the court must conform to the fundamental law of the land,the defendant's entitlement to them is therefore to be determined by those Sixth Amendment principles heretofore considered. (Opinion 11a-12a, Petitioner's Appendix A.)

Additionally, the respondent submits the following facts of record are essential for understanding the case: The prosecution concededly focused upon the events of June 11, 1979,

for bringing the instant criminal charges against Mr. Ritchie. However, the prosecutrix testified during the course of the trial that incidents like the one that allegedly occurred on June 11, 1979, had been occurring three to four times a week for about four years. (T.T. 35)[1]. She further admitted that a prior investigation by CWS[2] personnel had occurred in September of 1978 (T.T. 90-92, 125, 245) and no criminal charges had ensued from that investigation.

In balancing the competing interests here, the Supreme Court of Pennsylvania agreed ". . . that it would be absurd to read the statute as providing that the records be made available to a court of competent jurisdiction, while denying any use of them to the litigants in a criminal case before such courts." (Opinion 12a, Petitioner's Appendix A). Accordingly, the Supreme Court of Pennsylvania construed the state's limited confidentiality statute as requiring that a criminal defendant, through counsel, be granted access to the CWS files of the prosecutrix in order to effectively confront or cross-examine that witness.

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1. The designation "T.T." denotes the applicable page of the transcript of the notes of testimony taken during the trial, which commenced November 7, 1979.

2. The designation "CWS" refers to the Child Welfare Service, which was the agency in Allegheny County charged with the responsibility of monitoring and investigating reports of suspected child abuse.

SUMMARY OF THE ARGUMENT

The petition for a writ of certiorari to the Supreme Court of Pennsylvania must be dismissed for want of a substantial federal question. The scope of a state statute conferring limited confidentiality upon child welfare agency files in a criminal trial is properly a matter within the exclusive responsibility of the highest court of that state under the circumstances of the case. Where the state statute in question confers access to such material upon a court of competent jurisdiction, the highest court of the state must be the final authority on how the material may be used. When that decision rests firmly upon existing authority, no substantial federal question exists.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

The scope of a state statute conferring limited confidentiality[3] upon child welfare agency files is properly a

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3. At the time of trial, Section 2215(a) provided:

> Confidentiality of Records. (a) Except as provided in section 14, reports made pursuant to this act including but not limited to report summaries of child abuse made pursuant to section 6(b) and written reports made pursuant to section 6(c) as well as any other information obtained, reports written or photographs or x-rays taken concerning alleged instances of child abuse in the possession of the department, a county public child welfare agency or a child protective service shall be confidential and shall only be made available to :
>
> (1) A duly authorized official of a child protective service in the course of his official duties.
>
> (2) A physician examining or treating a child or the director or a person specifically designated in writing by such director of any hospital or other medical institution where a child is being treated, where the physicians or the director or his designee suspect the child of being an abused child.
>
> (3) A guardian ad litem for the child.
>
> (4) A duly authorized official of the department in accordance with department regulations or in accordance with the conduct of a performance audit as authorized by section 20.
>
> (5) A court of competent jurisdiction pursuant to a court order.

Act of Nov. 26, 1975, P.L. 438, No. 124 §15, 11 P.S. §2215.

The law has subsequently been amended, and now provides for an expanded class of officials and groups to whom the reports may be made available, including the attorney general, county commissioners, and law enforcement officials. See generally, 11 P.S. §2215(a).

matter within the sound discretion of the highest court of that state. This Honorable Court has stated many times in many ways that the construction of state laws is the exclusive responsibility of the state courts, Speiser v. Randall, 357 U.S. 513 (1958) and that the Supreme Court must accept the state court's construction of a state statute. Cramp v. Board of Public Instruction of Orange County, Florida, 368 U.S. 278 (1961). Of course, the corollary to this principle is that a State may not impose greater restrictions as a matter of federal constitutional law, when this Court has specifically refrained from imposing them. Fare v. Michael C., 442 U.S. 707 (1979); North Carolina v. Butler, 441 U.S. 369 (1979); Oregon v. Haas, 420 U.S. 714 (1975). However, this exception has no application to the present case.

The Supreme Court of Pennsylvania has construed a state statute in light of existing federal authority and has not expanded federal constitutional law. In construing the statute, the Court explicitly applied the statutory rule of construction "[t]hat the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth." 1 Pa.C.S. §1922(3). In doing so, the Court found "the Child Protective Services Law was enacted to identify and protect children suffering from abuse and to provide rehabilitative services to such children and their families." (Opinion at 6a, Petitioner's Appendix A). The legislative purpose was ". . . clearly to create an agency, not only to investigate allegations of child abuse, but to provide care, shelter, and erase where

possible the cruel stains upon their innocence." (Opinion at 7a, Petitioner's Appendix A). To accomplish the objective, the statute provides for confidentiality and, as well, for exceptions to the confidentiality imposed. Id. One of the answered exceptions is a court of competent jurisdiction.

The petitioner complains the Supreme court of Pennsylvania in upholding the Sixth Amendment challenge to the limited confidentiality statute "seriously undermined the announced purpose of the statute". (Petition at 17). Without further empirical support for either side, the argument is moot. Furthermore, since one of the exceptions to the legislatively created confidentiality claim is a court of competent jurisdiction, the highest court of the State must be the final authority on how it may be used. This Court is bound to accept the interpretation of state law by the highest court of the state. Hortonville Saint School District No. 1 v. Hortonville Education Ass'n, 426 U.S. 482 (1976). This Court has held that it is not its function to direct the state courts how to manage their affairs, but only to make clear federal constitutional requirements. Argersinger v. Hamlin, 407 U.S. 25 (1972). The state courts have final authority to interpret, and where the they see fit, to reinterpret their own legislation. Garner v. Louisiana, 268 U.S. 157 (1961).

Finally, the petitioner claims the decision is in conflict with decisions in two other jurisdictions. See, Camitsch v. Risley, 705 F.2d 351 (9th Cir. 1983) and State v. Storlazzi, 191 Comm. 453, 464 A.2d 829 (1983). Neither decision

deals with reports compiled during the time that the events leading to the criminal prosecution occurred and neither decision construes a statute granting limited confidentiality. In Camitsch, supra, the Court defined the limits of access to juvenile Court files first decided by this Court in Davis v. Alaska, 415 U.S. 308 (1974). In denying access, the Court in Camitsch, supra, found the fact that an adjudication of delinquency and the probationary status of the witness were actually placed before the jury was both persuasive and dispositive of the issue. No further information of relevance could be gleaned from the juvenile court file of the witness. In contrast, the complainant in case sub judice testified she had received the benefit of an investigation by CWS during the four year period she claimed the events transpired. The relevance of such material is apparent on its face.

Also in contrast, the Court in Storlazzi, supra, faced a request for access to certain psychiatrict, psychological and social agency files compiled on the complainant after her relationship with the defendant had ended and before trial. The defense requested access to the files in order to establish the competency of the witness to testify at trial. The court found nothing in the files to disclose material especially probative of the ability of the witness to comprehend, know and correctly relate the truth. Id. Unlike the present case, no other basis for the relevancy of the challenged material was declared or apparent on the record. Therefore, the only two cases cited by the petitioner as presenting a conflict with the case sub judice

fail to present any identity of the issues so as to merit a review by this Court.

For those reasons, this Court must dismiss the petition for want of a substantial federal question. Wetzel v. Ohio, 371 U.S. 62 (1962).

II. THE SUPREME COURT OF PENNSYLVANIA HAS CORRECTLY CONSTRUED THE APPLICATION OF THE CONFRONTATION AND COMPULSORY PROCESS CLAUSES OF THE SIXTH AMENDMENT TO THAT STATE'S LIMITED CONFIDENTIALITY STATUTE IN QUESTION.

The petitioner seeks to have this Honorable Court declare as a matter of constitutional principle the scope of access to be accorded defense counsel in a criminal case to material presumably protected by a state's limited confidentiality statute, when that material comes under a Sixth Amendment challenge for compulsory process and right of confrontation. Since the petitioner has failed to cite any persuasive decisional authority for its position, the petition must dismissed.

The rights of compulsory process and to confrontation of witnesses is made applicable to the states by the due process clause of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400 (1965). The due process clause of the Fourteenth Amendment also requires the State to disclose to criminal defendants favorable evidence that is material either to guilt or punishment. California v. Trombetta, 467 U.S. 479 (1984); United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963).

The purpose behind the confrontation clause is to provide an accused with an effective means of challenging the evidence against him by testing the recollection and probing the conscience of the adverse witness. Ohio v. Roberts, 448 U.S. 56 (1980). As this Court stated in Alford v. United States, 282

U.S. 687, 692 (1931) and again in South v. Illinois, 390 U.S. 129 (1968):

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial." Id. at 132.

Claims of confidentiality or privilege are necessarily suspect creatures in such an arena. "Disclosure, rather than suppression of relevant materials ordinarily promotes the proper administration of criminal justice." Dennis v. United States, 384 U.S. 855, 870 (1966). Such claims necessarily carry with them the possibility of infringing upon the truth-seeking process. (Opinion at 9a, Petitioner's Appendix A). As the Court observed of such privileges, "whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." United States v. Nixon, 418 U.S. 683, 710 (1974). There, the Court held that a claim of executive privilege, itself of constitutional dimension, may not prevail as against the need for disclosure.

The Court has upheld the need for full disclosure of relevant evidence as against state claims of privilege or

confidentiality as well. In Smith v. Illinois, supra, the Court held that, notwithstanding a contrary state evidentiary law, the confrontation clause guarantees a defendant the right to cross-examine a witness as to his real name and address. In Washington v. Texas, 388 U.S. 14 (1967), the Court held the compulsory process clause requires, as against a contrary state provision, that a defendant be able to present the favorable testimony of a co-defendant. In Davis v. Alaska, 415 U.S. 308 (1974), the Court held that the right of confrontation was superior to a state law concerning the confidentiality of juvenile proceedings.

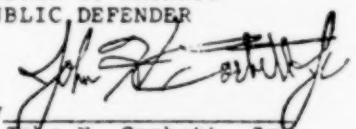
In contrast, the case sub judice presents a state statute of limited confidentiality allowing access by a court of competent jurisdiction. Yet, it would be absurd to suggest the highest court of that State may not determine how the same material may be used. This assertion has no place in the truth-seeking process. United States v. Nixon, supra. Accordingly, no persuasive authority exists for the argument advanced by the petitioner.

CONCLUSION

For these reasons, this Honorable Court should dismiss the petition for writ of certiorari for want of a substantial federal question or, alternatively, for the lack of relevant authority to support the proposition of law advanced by the petitioner.

Respectfully submitted,

LESTER G. NAUHAUS
PUBLIC DEFENDER

By 
John H. Corbett, Jr.
Chief-Appellate Division

No. 85-1347 (3)

IN THE

Supreme Court of the United States

October Term, 1985

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

GEORGE F. RITCHIE,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 10, 1986
CERTIORARI GRANTED MAY 27, 1986

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APPENDIX A

Opinion of the Supreme Court of Pennsylvania, Western District

The Opinion of the Supreme Court of Pennsylvania appears at pages 1a-34a of the Petition for Certiorari.

APPENDIX B

Opinion of the Superior Court of Pennsylvania

The Opinion of the Superior Court of Pennsylvania appears at pages 35a-47a of the Petition for Certiorari.

APPENDIX C

Judgment Dated December 11, 1985

Judgment Order of the Supreme Court of Pennsylvania appears at page 48a of the Petition for Certiorari.

APPENDIX D

Order Dated February 3, 1984

Judgment Order of the Superior Court of Pennsylvania appears at page 49a of the Petition for Certiorari.

APPENDIX E

Order of Court Denying Motions

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

vs.

GEORGE F. RITCHIE.

CC 790-3887.

ORDER OF COURT
RE
MOTIONS FOR ARREST OF JUDGMENT
AND NEW TRIAL

AND NOW, to-wit, this 1st day of December 1980, George F. Ritchie, the above named defendant, having filed through his attorney "Motions for Arrest of Judgment and New Trial", after arguments, a review of the record and in consideration thereof, IT IS ORDERED that the said Motions be and are hereby denied.

BY THE COURT:

HENRY R. SMITH, *J.*

Filed Clerk of Courts DEC 1 1980

APPENDIX F

Motions for Arrest of Judgement and New Trial

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

vs.

GEORGE F. RITCHIE.

No. CC 79 03887.

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1. Defendant was tried before Honorable Judge Henry Smith, and convicted of each of the four counts set forth in the information, *i.e.* rape, deviate sexual intercourse, incest, and corruption of moral of a minor, by verdict of jury on Tuesday, November 13, 1979.

2. The prosecution was represented by Attorney Truitt and defendant was represented by Attorney Joseph A. Steedle.

3. The verdict is contrary to the evidence.

4. The verdict is contrary to the weight of the evidence.

5. The verdict is contrary to the law.

6. The prosecution permitted testimony by certain witnesses, knowing such testimony was false or misleading to the prejudice of the defendant, as to periods of custody of the alleged victim.

Appendix F—Motions for Arrest of Judgment and New Trial.

7. The prosecution refused to furnish defendant any dates or places the alleged offenses occurred, other than June 11, 1979 and such refusal was sustained by Judge Popovich, on pretrial motions.

8. The prosecution and Court refused to permit requested examinations of the files of Child Welfare Services pertaining to the alleged victim, particular as to the investigation and physical examination of the alleged victim in September, 1978 and thereafter.

9. The Court refused the admission of certain papers found in the room of the alleged victim, which tended to show the freedom of communication with persons outside the household and the alleged victim.

10. The Defendant was convicted of incest based on incompetent and irrelevant testimony contrary to the alleged victim's birth certificate, all of which was prejudicial to the defendant on each of the counts.

11. The defendant reserves the right to file additional and supplemental reasons for a new trial ten days after the notes of testimony taken at the trial have been transcribed and a copy thereof made available to counsel for defendant.

Respectfully submitted,

JOSEPH A. STEEDLE
Joseph A. Steedle
Attorney for Defendant

APPENDIX G

Excerpts from Notes of Testimony Dated November 7, 1979 (Trial—pp. 17-94, 107-127)

* * *

[17] JEANETTE BILLS RITCHIE, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By the Commonwealth:

Q. Jeanette, I want you to talk loud enough so everyone can hear you. All right? A. Yes.

Q. Tell us your full name? A. Jeanette Bills.

Q. How do you spell your last name? A. B-i-l-l-s.

Q. Where have you been living for, say, for most of this year, up until June of this year? Where were you living? A. Stowe Rocks.

Q. Do you remember the address? A. 13 East McKees Rocks Terrace.

Q. Who were you living there with? A. My dad and my two brothers.

Q. What is your brothers' names? A. Ritchie and James.

Q. How old are both of them? [18] A. Ritchie is eight and James is four.

Q. Was your mother living there at that time? A. No.

Q. Just you and your two brothers and your father? A. Yes.

Q. Who is your father? A. George Ritchie.

Mr. Steedle: I object to that, Your Honor.

The Court: The objection is overruled.

Mr. Steedle: I don't think the—

The Court: The objection is overruled. We'll not argue about it.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

By the Commonwealth:

Q. Who is your father? A. George Ritchie.

Q. Is he here today? A. Yes.

Q. Point him out. A. Right over there behind his lawyer.

Q. The man in the brown jacket? A. Yes.

Q. He's the man you had been living with in that house with the two brothers, Ritchie and James? [19] A. Yes, Ritchie and Jamsie.

Q. How long did you live there in that house in McKees Rocks? A. About a year and a half, or half a year maybe—about that.

Q. Where did you live before that? A. Over on the North Side.

Q. Do you know what address? A. 212 Jacksonia.

Q. North Side of Pittsburgh? A. Yes.

Q. While you were living there in McKees Rocks, did you go to school? A. Yes.

Q. Where were you going to school? A. Stowe Rocks Junior High.

Q. What grade were you in? A. Seventh.

Q. What grade are you in right now? A. Seven.

Q. You are repeating the seventh grade? A. Yes.

Q. Do you still live in the same area in McKees Rocks now? A. Yes.

[20] Q. Where do you now live? A. Sheridan.

Q. Who did you live with on the North Side before you moved to McKees Rocks? A. My father and two brothers.

Q. The same people as you were living with in McKees Rocks? A. Yes.

Q. Do you know how long you lived at that address? A. Two years.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. Maybe you can tell us what grade you were in, what grade you were in when you moved from the North Side to McKees Rocks? A. I was in the sixth grade. And then I just started in the seventh grade when I moved.

Q. You moved right in the beginning of the seventh grade? A. No, about a couple of months, about three months I would say.

Q. About three months? A. Yes.

Q. After you started or before you started seventh grade? A. After.

Q. After? [21] A. Yes.

Q. All right. Do you know what grade you were in when you moved to this address on the North Side, Jacksonia? A. Fifth grade.

Q. Where were you before that? A. Before?

Q. Before the— A. What was that?

Q. Before you were on Jacksonia Street. A. I was on the North Side and I was one street down from Jacksonia.

Q. Where is that? What street is that? A. Samsonia.

Q. You lived on two streets then on the North Side? A. Yes.

Q. Is that correct? A. Yes.

Q. When did you first move to the North Side on that street, Samsonia? What grade were you in? If you remember. A. I don't.

Q. So you lived on Jacksonia and then you lived one street down from there on Samsonia? A. Yes.

[22] Q. Were you always living with your father and two brothers or was there someone else living there with you on the North Side? A. My mom came to visit. First she was living with us for a while. And then she moved out. And then she came and visited us sometimes.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. Do you remember how long it was that your mother moved out? Do you remember how long ago? Can you tell us about what grade you were in then? A. About sixth grade.

Q. About sixth grade? A. Yes.

Q. Are you sure about that or are you guessing? A. No.

Q. You are not sure? A. Sixth or fifth.

Q. All right. Your mother lived with you before that, before she moved out? A. Yes.

Q. Who lived there at the time that your mother lived there? Was your father also there? A. Yes.

Q. How about your brothers? A. Yes.

Q. Anybody else? [23] A. No.

Q. Jeanette, I want you to think about the date of June 11th of this year, sometime before you talked to the police. Do you remember the date of June 11th, Jeanette? A. Yes.

Q. You do remember? A. Yes.

Q. Why do you remember June 11th? What happened on that date? A. I was watching this story called the Little House on the Prairie.

Q. Is that a TV program? A. Yes, on Channel 11.

Q. You were watching Little House on the Prairie? A. Yes.

Q. What time did that show come on? A. It comes on at eight.

Q. What time does it end? A. At nine.

Q. How do you know that was June 11th? A. Because that was the first time in that month that I watched it.

Q. Do you know what day you talked to the police, the first time? [24] A. The 23rd of June.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. All right. Dc you remember what happened on June 11th after you watched the Little House on the Prairie? A. Yes.

Q. I would like for you to tell us, and to tell the ladies and gentlemen of the jury, what happened that day? Tell us what happened after the show went off? A. I was watching Little House on the Prairie. And then my father was upstairs. And then he came down as soon as it was over.

Q. What was he doing upstairs? A. He was hollering at my brothers or something, like that, you know, hollering at them. And he came downstairs. And he says, "I want you to do me a favor." And I said, "What is the favor?" And he said, "I want you to suck my penis." And I said, "Do I have to?" And he said, "Yes," or else."

Q. Did he use those exact words? Is that what he said? A. Yes.

Q. Or did he use some other words? A. What do you mean?

[25] Q. Jeanette, I want you to tell me the exact words that he used, if you remember. A. All right.

Q. What did he say when he came downstairs? A. I can't remember.

Q. He asked you to suck his penis? Is that right? A. Yes.

Q. Now, is that the word that he used? A. No.

Q. What word did he use? A. He used Dick.

Q. Are you sure he said that? A. Yes.

Q. Do you know what he meant when he said that? A. Yes.

Q. How did you know that that is what he meant? at that time? A. Because he said it a lot of times before.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. When he said that to you on June 11th, did you do it? A. Yes, or else he would have hit me or something.

Q. Did he ever hit you before? A. Yes, a few times before.

Q. Where did he hit you before? Well, first, why did he hit you? [26] A. Because I didn't do what he told me to do. I ignored him and I didn't do what he told me to do.

Q. Tell us how it happened when he came downstairs. What was the first thing you did after he said that to you? A. He made me take off all my clothes.

Q. He made you take off all of your clothes? A. Yes.

Q. And what were you wearing that night? A. I can't remember.

Q. Do you remember what kind of clothes he had on? A. I know he had pants on. But I can't remember what else.

Q. Did you have pants on? A. I think I had a pair of old blue jeans on.

Q. Do you remember anything else you had on? A. Some kind of a blouse.

Q. All right. When he told you to take off your clothes, what did you do? A. I didn't do it.

Q. All right. A. And then he took off my clothes.

Q. He took them off? A. Yes.

[27] Q. How did he do that? A. He just grabbed me. And he started, you know, taking off my clothes.

Q. Were you fighting with him? A. I was struggling.

Q. Did he have to struggle to take off your clothes? A. Kind of.

Q. Did he end up taking your clothes off? A. Yes.

Q. What happened after that? A. He made me suck his penis.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. All right. When, Jeanette, when did you learn the word "penis"? Who told you about that? When did you learn that word? A. Officer Panko.

Q. That is one of the police officers you talked to? A. Yes.

Q. Do you know what a man's penis is? A. Yes.

Q. What did you call it before Officer Panko told you that it was called a penis? A. Well, I called it a dingdong.

Q. Before you talked to the police, did you know what the area between your legs was called? [28] Do you know what that was called? A. Yes.

Q. What is it called? A. My peewee.

Q. Is that what you called it? A. Yes, my peewee.

Q. Did any of the police tell you what that should be called? A. Yes.

Q. What is it supposed to be called? A. Vagina.

Q. Do you understand what that is now? A. Yes.

Q. Now, how did he make you suck his penis? Tell us exactly what he did so we understand how this happened. A. Well, he pushed me down on the floor. He pushed it into my mouth. And he was forcing me to. And I was trying for him not to but he was forcing me, you know.

Q. Did anything else happen when he did that? A. No.

Q. Was the TV still on or was it turned off? A. No, he turned it off.

Q. Where was this happening? What room was this in? [29] A. Downstairs in the living room.

Q. Tell us a little bit about the house, Jeanette. When you walk in the front door, what is the first room you come to? Tell us what the first room you come to is? A. The living room.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. All right. Are there any other rooms on that first floor? A. The kitchen.

Q. Any other rooms? A. There is a pantry. I don't know if you count that as a room but there is a pantry.

Q. Is there a dining room on that floor? A. No.

Q. Where are the bedrooms in the house? A. Upstairs.

Q. How many bedrooms are there? A. Two.

Q. Who slept in those bedrooms? A. Me, and my little baby brother slept in one room and my big brother, Ritchie, slept in his room. And then, my dad changed the rooms around. He put my older brother in my room, with me, and my other brother.

Q. How old did you say, again, was your older [30] brother? A. Eight.

Q. Eight? A. Yes.

Q. And James is how old? A. Four.

Q. So the three of you then used the two bedrooms upstairs? A. Yes.

Q. Where did your father sleep? A. He slept downstairs. And then he got tired of sleeping downstairs on the couch. And so he went upstairs and laid on the bunk bed, one of those things you open up.

Q. What room was that in? A. My brother's old room, the smallest.

Q. That was not the same room you slept in? A. No.

Q. Where did he usually sleep, upstairs or downstairs? A. Downstairs.

Q. Your father would usually sleep downstairs? A. Yes.

Q. Where would he sleep when he slept downstairs? A. On the couch.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. That's in the living room? A. Yes.

Q. Where did this incident happen on June 11th? Where did it happen in the living room? A. On the floor.

Q. And you had all of your clothes off to do that? A. Yes.

Q. Did anything happen after he finished doing that, after he put his penis in your mouth? A. Yes.

Q. What happened? A. He asked me to do a favor. And I said, "It all depends on what it is." And he told me that he wants to stick his penis in my vagina.

Q. Did you know what was meant by that? A. Yes.

Q. And then what happened? A. I told him I wouldn't do it. And he said, "Do it or else."

Q. So what did you do? A. And so I didn't actually let him, you know.

Q. Tell us exactly what did happen? A. He tried but I was moving around, so he wouldn't.

Q. Did he have any of his clothes on then? A. No.

[32] Q. When did his clothes come off? A. When he took mine off, after he took mine off.

Q. Did he have any clothes on? A. No.

Q. Nothing at all? A. No.

Q. How about you? Did you have any clothes left on? A. No.

Q. Where were your clothes? A. I don't know.

Q. All right. What exactly did he do when you say he tried? What did he do? Tell us exactly what he did. Where were you, first of all. A. I was on the floor in the living room.

Q. Were you sitting on the floor or what? A. Laying.

Q. Laying on the floor? A. Yes.

Q. How were you laying on the floor? Were you face down or face up or what? A. What do you mean?

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. Were you face down or was your back down? A. I was on my back.

Q. What did your father do? [33] A. He tried to stick his penis in my vagina.

Q. How did he do that? What did he do? A. He pushed himself on me.

Q. All right. A. He tried to push it into my vagina.

Q. Did he actually get on top of you? A. Yes.

Q. Was he facing you? A. Yes.

Q. Did you feel anything when he got on top of you? A. Yes.

Q. Tell us what you felt. A. His penis.

Q. Where did you feel that? A. My vagina.

Q. Did you feel any kind of pain at any time? A. Yes, a little bit.

Q. When did it hurt? A. A few times when he was pushing, when I was moving around.

Q. When he was pushing? A. Yes.

Q. Where was he pushing? A. When he was laying down. He was pushing his [34] penis and trying to push it into my vagina.

Q. That's when it hurt? A. Yes.

Q. What did you do when that was finished? A. Well, it was one o'clock. He told me to go to bed. So he says, "Go to bed and don't make any noise."

Q. Did he get upset when you wouldn't let him do that? A. Yes.

Q. What did he do? A. He just hollered at me. He said, "Do it or else."

Q. Did he hit you at all that night? A. No. But, see, I know what "do it or else means" because before if I didn't do what he told me, you know, he would hit me.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. So then you're saying that that happened before that night, before June 11th?

The Court: What happened? It's not clear. Reask your question.

By the Commonwealth:

Q. Jeanette, did he do any of these things, make you suck his penis, or get on top of you at any time before that night? [35] A. Yes, about two weeks before.

Q. Do you know exactly what date that was? A. No.

Q. Where were you when that happened? A. When?

Q. The time before June 11. Do you know where it happened? A. At my house.

Q. Can you remember what happened that night? A. No.

Q. Did it happen at all before then? I'm talking about the same thing. A. Before?

Q. Before, when he said, "Do it or else," you said these things happened before and you knew what that meant, "Do it or else." A. Yes.

Q. How often did it happen before? A. About three or four times a week.

Q. Three or four times a week? A. Yes.

Q. How long has that been going on? A. Four about four years.

Q. Were these things happening when your mother still lived with you on the North Side? [36] A. No.

Q. This was after your mother lived with you then? A. Yes, that's right.

Q. It was after she had left? A. Yes.

Q. Do you remember how long afterwards? A. About a few months after.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. You don't know exactly when your mother moved away? A. No.

Q. Do you know what grade you were in when these things started happening? A. Five.

Q. Fifth grade? A. I think.

Q. Are you sure? A. No.

Q. You are not sure? A. No.

Q. Do you remember how it started? Do you remember the first time that he asked you to do anything like that? First, what did he ask you to do? A. Suck his penis.

Q. Is that the way he put it, or did he say it some other way? [37] A. Some other way.

Q. What was it? A. "Won't you suck my dick?"

Q. Is that the first thing he said to you? A. Yes.

Q. Do you know what he meant then? A. Not really.

Q. Well, how did he show you what he meant? A. Before, you know, he forced it into my mouth.

Q. Did he do anything else that day or soon afterwards? A. No.

Q. That was the only thing that he did at first? Is that right? A. Yes.

Q. Did he start doing it three or four times a week or did he wait a while at first? A. First he waited a little while.

Q. When you were living with your father then and this was happening on the North Side—or did this happen after you moved to McKees Rocks? A. North Side.

Q. It started on the North Side? A. Yes.

[38] Q. Is that right? A. Yes.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. Do you know what house you were in? Was it on Samsonia Street? A. It was on Samsonia.

Q. Then, you think that thing happened, these incidents, happened in all three houses? A. Yes.

Q. Would you tell us, as best as you can, Jeanette, what was your dad like when he would come home these nights and do these things. A. He was drunk.

Mr. Steedle: Objection.

The Court: Sustained as to the conclusion reached. Proceed.

Mr. Steedle: I'd like the jury to ignore that remark, Your Honor.

The Court: All right. The jury will ignore that remark. The objection is sustained. Proceed.

By the Commonwealth:

Q. Tell us how he was acting on those nights? A. He was staggering, mumbling to himself, talking to himself.

Q. Was he like that very often? [39] A. Yes.

Q. About how often was he like that? A. About four times a week.

Q. Did he ever do any of these things to you when he wasn't like this? A. No.

Q. How was he when he wasn't like that, Jeanette? A. He was a good father when he wasn't like that.

Q. Were you ever with him when he was drinking? A. Yes, a few times, yes.

Q. Where would that be? A. Sometimes he would be going to the Commonwealth Bar or to Becker's down in McKees Rocks or a few other bars.

Q. Did you go with him to those bars? A. Yes, sometimes.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. You did? A. Yes.

Q. Did your dad always make you take your clothes off or did you do it sometimes without your clothes off? A. Sometimes without my clothes off.

Q. Did it ever happen any place outside of your house? A. No, never.

[40] Q. Never? A. No.

Q. Never happened in a car anywhere? A. No.

Q. Never happened in somebody else's house? A. No.

Q. Did you often go to anybody else's house? Did you visit relatives at all? A. Yes.

Q. You did? A. Yes.

Q. What kind of relatives? A. I visited his relatives a lot.

Q. Are they his brothers and sisters? A. Yes, and his mother.

Q. And his mother? A. Yes.

Q. Do you remember the last time that you were visiting any of his relatives? A. No.

Q. You don't remember when it was, the last time before June 11th when you say this incident happened? Do you remember when the last time was that you visited any relatives? A. No, I can't remember.

[41] Q. You say you talked to the police about this on June 23rd. Is that right? A. Yes.

Q. Why did you talk to the police on that date? A. Because somebody tried to help me out and they took me to the police station.

Q. Who took you to the police station? A. Some lady by the name of Betty.

Q. What is her last name? A. Daley.

Q. Is she related to you? A. Yes.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. How is she related to you? A. I think she is my dad's cousin.

Q. Do you know anybody else in her family? A. Yes.

Q. Do you know how she found out about this happening? A. Cherie told Chuckie and—

Mr. Steedle: Objection, Your Honor.

The Court: Sustained.

By the Commonwealth:

Q. Who is Cherie? A. Cherie is her daughter.

[42] Mr. Steedle: I wish that the answer be stricken.

The Court: The two questions, ladies and gentlemen of the jury, that were just asked and answered, please ignore them. The objection is sustained. Proceed.

By the Commonwealth:

Q. You mentioned a person by the name of Cherie? A. Yes. Cherie is my Aunt Betty's daughter.

Q. How old is Cherie? A. Sixteen.

Q. Do you remember the last time that you saw Cherie before you talked to the police? A. Yes.

Q. When was that? A. The 20th.

Q. The 20th of June? A. Yes.

Q. Where was it that you talked to Cherie? A. In a car, in her brother's car.

Q. Tell us where you were that day? You were in her brother's car? A. Yes.

Q. What is her brother's name? [43] A. Chuckie Daley.

Q. How old is he? A. In his twenties.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. Where was the car when you were in this car? A. He was on Helen Street in a lot beside the bridge, the ramp that goes towards Bellevue.

Q. All right. What were you doing in his car? A. Well, we was in a bar.

Q. In a bar? A. Yes, we was in a bar, and my dad and them, you know,—well, my dad and me and my brothers came out. And I seen my cousin's car. And so I said, "There's Chuckie's car and maybe he will give us a lift up to Washington". And so he asked him and Chuckie said that he had needed some gas.

Q. Slow down a little bit. A. All right.

Mr. Steedle: Objection. I object to any statement about other parties.

The Court: Don't indicate what he said to you and what the conversation was. Just answer the question.

The Witness: All right.

[44] By the Commonwealth:

Q. You were in a bar with whom? A. My father and my brothers.

Q. Your two little brothers? A. Yes.

Q. Is that right? A. Yes.

Q. Do you have any older brothers? A. No.

Q. All right. And you saw Chuckie outside? Is that right? A. Yes.

Q. Correct? A. Yes.

Q. What did you do when you saw the car outside? A. I told my father that I seen Chuckie in Cherie's car—in Chuckie's car. I said that I seen Cherie and Chuckie there.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. What were you going to do after you left that bar? A. I don't know.

Q. What did you do when you saw the car there? A. I told my dad, you know, I said, "There goes Chuckie and Cherie and maybe they'll give us a lift to Washington."

[45] Q. Why did you need a lift to Washington? A. We didn't need a lift. We was going to catch a bus.

Q. To Washington? A. Yes.

Q. You're talking about Washington, Pennsylvania? A. Washington, Pennsylvania.

Q. Why were you going to go to Washington? A. We was going to camp out.

Q. Who was going to camp out? A. Me and my father and my two brothers.

Q. Did any of you go over to Chuckie and ask for a lift? A. My dad did.

Q. Did you see him do that? A. Yes. I walked over with him, me and my brothers.

Q. What happened after he asked for a lift? A. Chuckie said that he needed some gas.

Q. All right. Then what happened? A. And then my dad gave him some money and he went up with Johnny, you know, he went up to get some gas.

Q. Johnny? A. Yes, Johnny Socha.

Q. All right. [46] A. He was inside the bar with us.

Q. Inside the bar? A. Yes.

Q. Who is he? A. He's a friend of my dad.

Q. Do you know how old he is? A. No.

Q. He is your age or around your dad's age? A. Around my dad's age.

Q. Older than you are? A. Yes.

Q. Who went to get the gas? A. Johnny and Chuckie went up to the Boron station.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. Johnny and Chuckie went up? A. Yes.

Q. Then what happened after that? Where did you go? A. I was sitting in the car with Cherie and my two brothers.

Q. Anybody else in the car? A. Yes.

Q. Who else? A. My father was in the front seat.

Q. Your father was in the front seat? A. Yes.

[47] Q. Where were your two brothers? A. They were in the back seat with me and Cherie.

Q. Four of you in the back seat? A. Yes.

Q. What happened while you were in the car? A. Cherie—well, he started mumbling about something.

Q. Who is he? Who are you referring to? A. My father. My father started mumbling with, you know, some things and then—

Q. Who was he talking to? A. Himself. And then he said, "Cherie, if you want to know something about sex, ask Jeanette, she knows all about it." And before that he said, "You're developing pretty good."

Q. Who was he saying that to? A. Cherie.

Q. Did you hear him say that? A. Yes.

Q. What happened after he said those things to Cherie? A. And then my cousin, Chuckie, and Johnny, you know, started coming down from the Boron station. And then we just sat there. And then she started questioning me, Cherie.

[48] Q. Cherie started questioning you? A. Yes.

Q. What kind of questions did she ask you? A. She was wondering what he was talking about, like when he said that.

Mr. Steedle: Objection. I object to any statement made by the girl.

The Court: The objection is sustained. It will be sustained unless there's further groundwork.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

By the Commonwealth:

Q. Cherie started talking? A. Right.

Q. She started talking to you? A. Right.

Q. Is that correct? A. Yes.

Q. Did she ask any questions? A. Yes.

Q. What questions did she ask you?

Mr. Steedle: I object to that.

The Court: Who was in the car?

By the Commonwealth:

Q. Yes, who was in the car? Who was in the car that Cherie was talking to? [49] A. Me and my two brothers and my father.

Q. The same people that were there while Johnny and Chuckie went to get gas? A. Yes.

Q. Were Chuckie and Johnny back by the car then? A. No. They were coming down the ramp still.

Q. What was your dad doing while Cherie was asking you these questions? A. Mumbling to himself.

Q. Was he talking to you at all? A. No, not that I know of.

Q. Was Cherie talking to him? Or was she just talking to you? A. Just to me.

Q. How did she ask you these questions? A. She was thinking why he would say that—

Q. Don't tell us what she was thinking. A. All right.

Q. How did she ask you these questions? Did she just talk across in the car to you or what? A. I was sitting right beside her.

Q. What exactly did she do? A. She asked me if he was hitting me.

Mr. Steedle: Objection.

The Court: Overruled at this [50] point.

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By the Commonwealth:

Q. Tell us what she asked you? A. She started asking me if he was hitting me or anything. And I said, sometimes. And I asked her why she wanted to know and she said "Just because, I just wanted to know".

Q. Did she ask you anything else? A. Yes, she started questioning me as to, you know, what did he mean by "Jeanette knows", you know, all about sex. And I said, I don't know. And she says that something has to be up, you know. So I told her.

Q. What did you tell her? A. I told her that he was trying to bother me and trying to have sex with me.

Q. Did you explain to her the kind of things you are telling us today? A. Yes.

Q. Did you complain to her about that or were you just telling her? A. I was just telling her. I told her, you know, and she made me a promise that she wouldn't tell anybody.

Q. Why did she make you that promise? Who asked [51] her for that promise? A. Me.

Q. Why? A. I didn't want nobody to know. She was the first person I told.

Q. Why didn't you want anybody to know? A. I was afraid that if I would have told her, you know, she would have told somebody else and then they would tell my father and then if they told my father that then I would get into trouble.

Q. Had you told anybody else at all about this before you told Cherie? A. No—yes.

Q. Who was that? A. My mother and my grandmother.

Q. How long ago was that? A. I can't remember.

Q. Was that before or after the last time it happened? A. Before.

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Q. Before the last time it happened? A. Yes.

Q. Was it just recently or a long time ago? A. A long time.

[52] Q. What happened when you told your mother about that? A. She didn't believe me and my grandmother didn't believe me.

Q. What did you do then when they didn't believe you? A. I told them to just drop the subject and forget about it. And so they did.

Q. All right. Had you told anybody else? Had you told any of your father's relatives? A. No.

Q. Had you told any of your father's brothers or sisters? A. No.

Q. Have you told any of your other friends? A. No.

Q. Have you told anybody at school about it? A. Not at all.

A. How come you didn't tell anybody at school? A. I don't know.

Q. After you talked to Cherie on June 20th, did you go to the police yourself? A. No.

Q. Who took you to the police? A. Cherie Daley's mother.

[53] Q. Her mother? A. Yes.

Q. Did you want to go to the police that day? A. I didn't, you know, know where they were going. She said that we can get some hamburgers and stuff and she had just won $500 at the bingo. And she asked my dad if we could go and he said yes.

Q. Did you know that you were going to the police that day? A. No.

Q. Did you ask anybody to take you to the police? A. No.

Q. Whose idea was it to go to the police? A. My Aunt's.

Q. Mrs. Daley? A. Yes.

Q. What happened when you got to the police station? A. We started there talking, you know, and one of the Pankos helped us. He asked why we were there.

Q. Slow down a minute. Who are the Pankos? A. One of the Pankos helped us. They're police officers.

[54] Q. It was a police officer? A. Yes.

Q. Where are they police officers? Do you know? A. McKees Rocks.

Q. All right. What happened with them? A. They asked why we were there and Betty told them why we were there.

Q. All right. Did anybody talk to you? A. Yes.

Q. Who talked to you about it? A. Officer Panko and Paul Cooley (phonetic), he came in, and I can't say his name, but he came in. And then Officer Wolfe came in. And that's all. They started talking.

Q. Did you tell the police that day what you are telling us today? A. Yes.

Q. Who asked you about those things? A. They started asking me because my Aunt told them what she brung me there for.

Q. If your Aunt hadn't brought you to the police station that day would you have gone to the police yourself? A. No.

Q. Why wouldn't you go to the police? [55] A. I was too afraid.

Q. Who were you afraid of? A. My father.

Q. Just to make sure that we know that you know what you're talking about: You have said that your father has been making you have sex with him? A. Right.

Q. And he has been putting his penis into your mouth and getting on top of you? Is that right? A. Yes.

Q. Do you know whether that is right or wrong? A. That is wrong.

Q. Do you know what you're doing Jeanette, and that is that you're saying things about your father that are serious? A. Yes.

Q. And do you realize that? A. Yes.

Q. Do you realize that we're asking you to tell the truth about these things? A. Yes.

Q. Have you told us anything that is not the truth today? A. No.

[56] Q. Have you told the police anything that is not the truth? A. No.

Q. You realize that you have sworn to an oath today to tell the truth? A. Yes.

The Commonwealth: That's all I have. Thank you, Your Honor.

The Court: You may cross examine.

CROSS EXAMINATION

By Mr. Steedle:

Q. You said you told your grandmother and your mother about what your father was doing to you? Is that what you said? A. Yes.

Q. That was before June 11th? Is that what you're saying? A. Yes.

Q. Do you recall where they were when you talked to them about it? A. I can't really remember.

Q. Did you consider it serious at the time when you told your mother and grandmother? [57] A. Yes.

Q. You did? A. Yes.

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Q. Well, will you tell us where it took place? Was it in your house or where? A. I can't remember.

Q. And this grandmother that you're talking about, what is her name? A. Mary Clem.

Q. How do you spell it? A. I think it's C-l-e-m.

Q. And your mother's name? What's her name? A. Helen.

Q. Helen? A. Yes.

Q. Was it a month or two months before the June 11th date that you told them? A. No.

Q. When was it? A. It was longer than that. It was way before.

Q. Was it over on the North Side when you were living on the North Side? A. I don't remember.

Q. You don't remember? A. No.

[58] Q. Do you remember what grade of school you were in when you told them? A. No.

Q. Do you remember who was with your mother and your grandmother when you told them? A. Just her and my grandmother, my mom and my grandmother.

Q. Were you living with your mother at the time or were you living with somebody else at the time? A. I don't remember.

Q. Well, who brought you to this particular place, when you talked to your mother and your grandmother? A. I don't know that either.

Q. Now, Jeanette, as I understand your testimony, Mr. Ritchie made this proposition to you right after the program that you saw, the television program that night on June 11th? A. Yes.

Q. That would be what time? A. Nine.

Q. Nine p.m.? A. Yes. Well, that's when it starts.

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Q. And on June 11th, when it is finished, and the [59] show was over, then everything was finished, this incident? A. No, at one o'clock in the morning.

Q. I'm talking about the TV show. A. Oh, the TV show?

Q. Yes. A. It started at nine.

Q. When the television show was over, you say that your father came downstairs and shut the television off? Is that what you're saying? A. Yes.

Q. And then he had this relationship that you were talking about, that you testified to, from nine o'clock p.m. until one o'clock in the morning. Is that right? A. Yes.

Q. And your father was intoxicated, you said? A. Pardon?

Q. Was your father drinking? A. Yes.

Q. Was anybody else in the house that night? A. Me and my two brothers and myself.

Q. Do you recall what you ate for supper that night? A. I don't even remember of even eating supper that night.

[60] Q. You mean you don't even know whether you ate supper or not? A. Right.

Q. Who prepared your supper? A. Sometimes I did and sometimes he did.

Q. What type of food did you prepare? A. Some things, all kind of things.

Q. Like what? A. Well, sometimes I make spaghetti and sometimes I fry meats.

Q. You fry meats? A. Yes.

Q. What kind of meats would they be? A. Pork chops.

Q. Pork chops? A. Yes.

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Q. You don't know whether you ate at all on that particular day? Is that what you're saying? A. Yes.

Q. How often did you go without eating supper? A. I don't know.

Q. How long does it take to cook spaghetti?

The Commonwealth: Objection. Your Honor, at this point I don't see the relevancy of how long it takes to [61] cook spaghetti.

The Court: Overruled. I'll allow the question. Do you want her to answer that?

Mr. Steedle: Yes.

The Witness: Wait a minute—well, I don't know. I read a book when I make it.

By Mr. Steedle:

Q. How long did it take you to cook pork chops? A. I don't cook them. I fry them.

Q. You fry them? A. I fry them.

Q. When you fry your pork chops, how long does it take? A. I never did count minutes on them, you know. I just fry them until they're done.

Q. How often did you do that? A. A while.

Q. Pardon? A. A while.

Q. Did you do this more than one time for your father and for the family? A. Yes.

Q. Was this a habitual thing that you did? Did you [62] do it regularly or one time a week or once a month? A. Yes, regularly.

Q. More than that? A. What do you mean?

Q. Once a week? A. No, no, about two times a week or three times.

Q. How many times did you cook spaghetti? A. I don't know.

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Q. Would you say you cooked it one time? A. I remember cooking it three times.

Q. Over what period of time did you cook spaghetti three times? A. What was that question?

Q. Over what number of days did you cook the spaghetti meals three times? A. You mean days in between?

Q. Yes. A. I don't know.

Q. What did you serve the last time you had spaghetti? What did you have with the spaghetti? A. Some Italian bread and butter.

Q. And how do you do it? A. You take the noodles out of the box.

[63] Q. And then what else? Do you put them in a pan? A. No. I took them out of the box. I put them in the pan and I boiled them, yes, and then I put salt in the pan also.

Q. Is that all you did? Is that it? A. Yes.

Q. You added nothing else? Just spaghetti from the box and right into the pan? A. I said I boiled it until it was done. When it was done I make the sauce.

Q. After it was cooked you make the sauce? A. Yes. I rinsed the spaghetti then and then I put it in a bowl and then I mix it all around with the sauce.

Q. Now, you said that your mother left you some three or four years ago? A. Yes.

Q. I want to ask you to read this paper, the Commonwealth of Pennsylvania, Department of Public Welfare paper. I want you to read it to yourself first.

The Commonwealth: I don't know what it is.

Mr. Steedle: You can see it before I ask her questions on it.

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[64] The Commonwealth: All right.

The Court: I'd like to take a look at it.

(Court and counsel examine document.)

By Mr. Steedle:

Q. Did you read that? A. Can I see it again?

Q. Yes. (Handing to witness.) A. All right.

The Commonwealth: Before the witness reads anything, Your Honor, I object to the relevance. I haven't seen any relevance to the reference to the Department of Welfare records.

The Court: May I see that a moment? Gentlemen, let's come to side bar.

(Side bar had off the record.)

The Court: I'd like to have the Reporter at side bar.

(Side bar.)

The Court: Proceed.

The Commonwealth: I don't see the relevancy to the Public Welfare [65] records.

The Court: Mr. Steedle, you're offering this? Do you want to explain what it is?

Mr. Steedle: I asked the young lady to read it. It's a form by the Department of Public Welfare, whereby it sets a certain day in which her mother stated that the children were living with her. And I just would like to ask her to read it to see if I could refresh her recollection when, in fact, when did she live with her mother last.

The Commonwealth: I don't see where that document has any relevancy to asking her when her mother last lived with her. I don't see the relevance, Your Honor. I don't see any benefit to

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be served by showing this to this witness, who doesn't know anything about it. You can ask her when the last time was that her mother lived there with her. And then if you have anything that refreshes her recollection that she probably would be aware of, [66] that's fine. I don't see any value to this at all. This doesn't seem to me to indicate anyway when the parties lived together.

The Court: This is a young child. There's nothing to indicate that she has even seen this at any prior time. She wouldn't be involved in making arrangements with the Department of Public Welfare.

I understand what you're saying.

Mr. Steedle: All I was trying to do is to see if this would ring a bell in her mind and then if she would change her position as to when her mother lived with her last. If she can't, that's all that I'm going to ask her.

The Court: You may ask the question in some other manner.

Mr. Steedle: I haven't asked any questions.

The Court: You're planning to. You may try to develop that in some other manner. I'm not going to allow you to use that paper. The objection is sustained.

[67] (Conclusion of side bar.)

Juror: Your Honor, I'm not clear about the rules as far as the jurors talking about the case among themselves.

The Court: All right. You are not to speak about it, as I explained to you, members of the jury, you are not to speak about the case until we conclude.

Mr. Steedle, you may proceed.

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By Mr. Steedle:

Q. Do you remember your mother taking you to Dr. Fisher's, Dr. Fisher's office in 1978? A. No.

Q. All right. Did your mother ever take you to Dr. Fisher's office as far as you know? A. Yes.

Q. When was the last time she took you to Dr. Fisher's office? A. I can't remember.

Q. Do you remember where you were living? A. No.

Q. Do you remember what the trouble was? A. No.

Q. Do you remember how old you were? [68] A. No.

Q. Do you remember what grade in school you were? A. No.

Q. When you lived at 212 Jacksonia Street, did your mother ever live with you there? A. Yes, for a while, and then she moved out.

Q. And then she moved out? A. Yes.

Q. How long ago was that? A. About four years ago.

Q. Three years ago? A. About four years ago.

Q. About four years ago? A. Yes. It was about that.

Q. About four years ago? A. Yes.

Q. How long did you live at 212 Jacksonia? Did you live there one period of time or two different occasions? A. What do you mean by that?

Q. Did you move into 212 Jacksonia Street and move out and then move back to 212 Jacksonia Street? Was there a space of time between living on Samsonia Street one time and then living on Jacksonia Street and then another [69] time going back to 212 Jacksonia? A. Not that I remember.

Q. You lived there only one period of time? You only lived there one period of time? A. Right.

Q. How long a period of time did you live on that street? A. About a year, about a year or a year and a half.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. How long did your mother live there with you? A. She just came to visit.

Q. This place on Jacksonia Street, how many rooms were in this particular apartment or house that you lived in? A. Two.

Q. What was it? A bedroom and kitchen? Is that what you're saying? A. Yes.

Q. And you and your father and two brothers lived there? A. Yes.

Q. And your mother lived with you sometime? Is that what you're saying? A. Yes.

Q. All right. Immediately before you lived there, where did you live before? [70] A. Before I lived there?

Q. Yes. A. Samsonia Street on the North Side.

Q. Before you moved to 212 Jacksonia Street, you lived on Samsonia Street? A. Yes.

Q. Who lived there immediately before moving to 212 Jacksonia? A. I don't understand that question.

Q. Well, I'll try to rephrase it. You say that you lived for a period of time on 212 Jacksonia Street. Is that correct? A. Yes.

Q. And the only people you lived with was your father and your two brothers and then your mother came to visit you sometimes? Is that correct? Is that what you're saying? A. Yes.

Q. Now, you did live with your mother at one time. Is that correct? A. Yes.

Q. And your mother and your father weren't living with you? Is that correct? A. No.

Q. You mean you always lived with your father? [71] A. No.

Q. When didn't you live with your father? A. Five years ago.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. In other words, five years ago your father and mother parted company? Is that what you're saying? A. Yes.

Q. That's when you—well, that's when your mother left you five years ago? Is that what you're saying? You lived with your father? A. No, you have me confused.

Q. Tell us what you mean. I don't want to put words in your mouth. A. My mother left my father and she was living in McKees Rocks at her mother's place, with me and my two brothers for a while and then we moved to the North Side.

Q. When you moved to the North Side, where did you move to? A. Samsonia Street.

Q. And you and your mother and father lived on Samsonia Street for a while? A. Yes.

Q. Do you recall when your mother got a divorce from Mr. Ritchie here? [72] A. No.

Q. Were you aware that your mother did get a divorce from Mr. Ritchie? Are you aware of the fact at that time that your mother did get a divorce from Mr. Ritchie? Were you aware of that? A. No.

Q. When did you find out that your mother divorced your father? A. When we went to move to McKees Rocks.

Q. All right. A. When I packed some stuff and we moved. And there was a tin box and I looked through there and I saw it.

Q. So, your mother left your father and she took you and your two brothers with her? Is that correct? A. Right.

Q. And you lived in McKees Rocks? A. Right.

Q. And did you stay at McKees Rocks until—well, until when? A. When?

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. Where did you go from McKees Rocks? A. From McKees Rocks we went to the North Side.

Q. Where on the North Side? [73] A. Samsonia Street.

Q. All right. You moved to Samsonia Street? A. Yes.

Q. Where were you living on the North Side when you went to McKees Rocks? A. I didn't live on the North Side when I went to McKees Rocks.

Q. When your mother and father separated, where were you living? A. You mean before that?

Q. You said that—and maybe I'm misunderstanding you, and you correct me if I'm misunderstanding you—but I thought you said that your mother left your father and took you and your two brothers to McKees Rocks? Is that what you told us? A. No.

Q. What did you tell us? A. Before I lived on Samsonia we lived in McKees Rocks.

Q. Was your father living in McKees Rocks with you? A. No.

Q. That's what I'm asking now. Where were you living when your mother took you and your two [74] brothers from the house where your father was living? A. To where?

Q. Where were you living? A. Four Graham Street, McKees Rocks.

Q. Whose place is that? A. My grandmother's. It's my grandmother's house.

Q. I believe that you mentioned her name already. You were talking about Mary Clem? A. Yes.

Q. Now, did Mr. Ritchie live with you in McKees Rocks in Mary Clem's house? A. No.

Q. All right. That's what I'm asking you now. Where was your dad living when you were living in McKees Rocks? A. I don't know.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. All right. Now, where were you living before you moved to McKees Rocks? A. We lived in Washington, Pennsylvania.

Q. You went from Washington, Pennsylvania— A. To McKees Rocks.

Q. Directly? A. Yes.

Q. When you were living in Washington, Pennsylvania, [75] you and your father, your father and mother were living together then— A. And my two brothers and my grandfather and his lady, his wife, lived in the same house. But we owned the upstairs. We had the upstairs.

Q. So, as I understand it, your mother separated from your father when you lived in Washington, Pennsylvania? A. No.

Q. Tell me where your mother and father were living when they separated? A. When they got back to McKees Rocks they separated. I don't know why they separated.

Q. Did you live somewhere before you went to your grandmother's house? A. Yes.

Q. Where did you live? A. Washington, Pennsylvania.

Q. Did I understand the next thing to be that then you were living with your grandmother? A. Yes.

Q. But your father was not living with your grandmother? A. Right.

Q. So when you moved from Washington, Pennsylvania, [76] to McKees Rocks at your grandmother's house, your mother and father must have separated? A. Yes.

Q. Now, we have you and your mother and your two brothers in McKees Rocks.

Now, when did your father come back to live with you? A. He didn't. It was my mother's idea.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. It was your mother's idea to have him come back? Is that what you're saying? A. Yes. My mom wanted him to move back with us. And so my mom looked for a place on the North Side.

Q. What place did she find? A. Samsonia Street.

Q. Now, how long, if you remember, did your father stay at 406 Samsonia Street? A. As soon as we moved there.

Q. For how long? A. Until we moved from—well, as soon as we moved from McKees Rocks.

Q. I think I'm misunderstanding you. Now, you and your mother and your two brothers and your dad apparently set up housekeeping on Samsonia Street sometime? Is that right? [77] A. Yes.

Q. Correct? A. Yes.

Q. After you moved from McKees Rocks, and then your dad and your mother rejoined each other? Is that what you're saying? A. Yes.

Q. Now, you're on now Samsonia Street? Is that right? We're now on Samsonia? A. Yes.

Q. Now, the next place you moved to, as I understand your testimony—and I'm not trying to put words in your mouth—was 212 Jacksonia Street? A. Yes.

Q. And when you moved from Samsonia Street to Jacksonia Street, who all moved to that new address? A. Me, my father, and my two brothers, we was on Samsonia Street and my mom moved out. I don't know why.

Q. Your mother moved out when you were on Samsonia Street? A. Yes.

Q. So your father lived with you without your [78] mother on Samsonia Street? A. For a period of time, yes.

Q. Immediately before you moved to 212 Jacksonia Street? A. After.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. I think I'm using the wrong words with you. I don't want to confuse you. A. All right.

Q. You moved into 212 Jacksonia Street with your father and your two brothers and your mother had already left you? Isn't that correct? A. Yes.

Q. That's according to your testimony? A. Yes.

Q. She left you when you were living on Samsonia Street? A. Yes.

Q. Is that what you're saying? A. Yes.

Q. Now, do you know where she went to? A. To her mother's house.

Q. Where was that? A. Four Graham Street.

Q. But you didn't go with your mother when she went? Is that correct? [79] A. No.

Q. You stayed with your father? A. Yes.

Q. I believe your testimony is that this is where it all started, is that correct, on Samsonia Street? Isn't that what you testified to? A. Yes.

Q. And that's when your father started making advances when you were living alone with him on Samsonia Street? A. Yes.

Q. Tell us what type of a house that was? A. That had—well, it had three rooms and a bath.

Q. Three rooms? A. Yes, and a bath.

Q. These three rooms, one or two bedrooms? A. One bedroom, a kitchen, and a living room.

Q. You testified about Cherie. You said something abour her being related or her mother being related to Mr. Ritchie? A. Yes.

Q. You don't know the relationship, do you, Jeanette? You don't know what the relationship is? A. I think they're cousins.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

[80] Q. And I think one time you told somebody that they didn't get along. Is that right? A. No.

Q. Didn't you say something about the fact that there was an ill feeling between them? A. Pardon?

Q. There was ill feeling between your Aunt, who is Mrs. Daley, and her husband and the Defendant here? A. Yes, they didn't get along that well, that's right.

Q. That's what you testified? That's what you so stated previously? Is that right? A. Yes.

Q. They didn't like each other? A. I don't know if they liked each other but they didn't get along well.

Q. Now, are you sure where you lived and who lived with you as you are of the facts that you talked about on June 11th, 1979? A. Pardon?

Q. Are you telling just as much truth about these places where you lived as you're telling this jury about what happened to you on June 11th? A. Yes.

[81] Q. So, if we prove that you are wrong on these places where you lived with your father, you're also wrong on the June 11th testimony, is that correct?

The Commonwealth: Objection.

The Court: Sustained.

By Mr. Ste lle:

Q. Now, I believe that you testified that you lived in McKees Rocks with your father and your two brothers just recently, that is since you have been in the seventh grade? Isn't that right? A. Yes.

Q. I think you said you went to school at Stowe Rocks? A. Yes.

Q. When you moved from the North Side, I believe you said that was 212 Jacksonia Street, and you moved to the Terrace in McKees Rocks. A. Yes.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. And you transferred to their school after the school term started? A. Yes.

Q. So you started in the seventh grade? A. Yes.

[82] Q. On the North Side? A. Yes.

Q. In September of 1978? Isn't that right? A. Yes.

Q. That's last year? A. Yes.

Q. So in September of 1978 you started seventh grade on the North Side? A. Yes.

Q. And then you transferred to Stowe Rocks and continued in the seventh grade at that school? A. Yes. I had to repeat it over.

Q. You had to repeat it over? A. Yes.

Q. Do you know why you're repeating it?

The Commonwealth: Objection. There's no relevancy.

The Court: Sustained.

By Mr. Steedle:

Q. Now, after we discussed where you lived, do you remember where you told your mother and grandmother about your father molesting you? A. No.

Q. You said that they didn't believe you. A. That's right.

[83] Q. And you said, "Well, that's it." Is that what you said? A. I said, "That's it, forget it then."

Q. "Forget it"? A. Yes.

Q. You weren't interested either? Is that what you said? A. What do you mean by that?

Q. Well, you didn't show any further interest in making this complaint at that time? You didn't repeat the complaint at other times to your mother and grandmother before June 11th, 1979? A. Right.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. Is that right? A. Right.

Q. And the only thing you did was discuss it with your girlfriend, Cherie, and you didn't complain to your girlfriend, Cherie, but you discussed it with her? Is that right? A. My cousin, Cherie.

Q. Your cousin? A. Yes.

Q. You made no complaint about it? A. No.

Q. Now, this conversation that you were having [84] with Cherie, I understand that your father was in the front seat? A. Yes.

Q. And were you talking in a manner in which he could overhear you? A. No, I was whispering.

Q. Were you laughing and joking about it? A. No.

Q. Was she joking about it? A. No.

Q. She was not? A. No, she was as serious as I was, like I was.

Q. Now, you said that you went to Washington, Pennsylvania with your father, is that right, on that same day that you talked to Cherie? A. Yes, and my two brothers, and Johnny.

Q. That was for the purpose of overnight camping in a tent, camping? A. Yes.

Q. Who went camping with you? A. Me and my two brothers and Johnny and my father.

Q. Was this a deserted place where people didn't live? A. Yes.

Q. And you stayed all night until the next morning? [85] A. Yes.

Q. And your father didn't molest you that night? A. No.

Q. Isn't it true that the next night you went camping with your father? A. Yes.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. Overnight? A. Yes.

Q. And your father didn't molest you that night? A. No, because he wasn't drinking.

Q. Did you like your father drinking? A. No, not one bit.

Q. Now, is this one way to get back at him?

The Commonwealth: Objection.

The Court: Sustained. And I don't think the question is quite clear. I'm not saying you can't ask the question. But I don't think it's quite clear to the witness. It wasn't clear to the Court. I'm not saying that you can't ask it. But it was not clear. I am not sustaining the objection as to the substance of the question. The question was unclear.

By Mr. Steedle:

Q. Did you like the fact that your name was Bills [86] rather than Ritchie?

The Commonwealth: I object to that.

The Court: Yes, rephrase the question.

Mr. Steedle: I think it's proper. This is cross examination. I have a right to put it in.

The Court: The District Attorney has a right to object to the question. If you want to rephrase the question, fine. I'm not sustaining the question as to the subject matter but the manner in which the question was asked.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

By Mr. Steedle:

Q. Did you have any resentment for the name Bills rather than Ritchie? A. I—

The Commonwealth: Do you know what "resentment" means?

The Witness: No.

By Mr. Steedle:

Q. Did you have a dislike to the name Bills, rather than Ritchie? A. No.

[87] Q. Were you satisfied with that name? A. Yes.

Q. Did you ever make any complaints about it? A. I asked him if I was going to get it changed.

Q. So, you did have some thoughts about the name? Is that correct? A. Yes.

Q. And you also disliked his drinking? A. Yes.

Q. And your father does drink? A. Yes.

Q. And I understand that you testified that your father lived with you all of these years— A. Yes.

Q. And how many times did your father slap you in all of these years? A. About three.

Q. About three times? A. Yes.

Q. And that was the extent of the corporal punishment that you ever got from your father?

The Commonwealth: Do you understand that question?

The Witness: No.

The Court: Mr. Steedle, be a [88] little more careful with the wording. This is a thirteen year old girl.

Mr. Steedle: All right.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

By Mr. Steedle:

Q. I mean physical punishment. Do you understand what I'm talking about? A. Yes, I do.

Q. That's the extent of the punishment that you got in those three years? Isn't that right? A. Yes.

Q. You were slapped about three times? A. Yes.

Q. Now, as I understand it, you made the statement to your cousin, Cherie, on the 20th? Is that correct? A. Yes.

Q. And the first time you talked to the police department was on the 23rd? A. Right.

Q. Who did you talk to besides Cherie between the 20th and the 23rd about the conduct of your father? A. Just to Cherie.

Q. So, the matter was dropped completely until the 23rd? Is that correct? [89] A. Pardon?

Q. Nothing ever developed from the time you told Cherie about it on the 20th until the 23rd? Isn't that correct? A. Yes.

The Court: Please speak up a little bit.

The Witness: I'm sorry.

By Mr. Steedle:

Q. In fact, you had no idea where your Aunt was going to take you on the 23rd? Is that correct? A. Right.

Q. So it was not your idea to go to the police department whatsoever? A. Right.

Q. And did your Aunt tell you on the way to the police department that that is where she was going to take you? A. As soon as she got us some hamburgers she said that we have to go somewhere.

Q. We have to go somewhere? A. Yes, that's what she said we would have to do after we had some hamburgers.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

She said we were going to go somewhere. And I asked her where and she just said, over to the police [90] station.

Q. So that's when the bomb shell was dropped? Is that when she said she was dragging you to the police station on the 23rd? A. She took us there, yes.

Q. She took you there? A. Yes.

Q. And this Aunt—what's her name? A. Betty, Betty Daley.

Q. Now, you say that this took place three or four times a week on an average for three years? Is that right? A. Yes.

Q. Do you know what a year is? A. Yes.

Q. There's twelve months in a year? A. Yes.

Q. At any of these occasions, were there ever any bruises which you reported to anybody? A. No.

Q. Did you ever have to go to a doctor for bruises? A. No.

Q. Do you recall Child Welfare Services visiting you in September of 1978? A. Yes.

[91] Q. Do you know what the complaint was at that time? A. For abuse.

The Commonwealth: Objection unless the witness knows of her own knowledge.

Mr. Steedle: I'll ask her if she knows.

The Court: I'll allow the question.

By Mr. Steedle:

Q. Do you know what a complaint is?

The Court: That objection was overruled. Go ahead and answer.

The Witness: For abuse, child abuse.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

By Mr. Steedle:

Q. Some type of child abuse? A. Yes.

Q. Did somebody from Child Welfare visit with you and ask you questions? A. Yes, there was a lady that questioned me.

Q. And what did she ask you about? A. She asked me if I ever got hit. And she checked me for bruises on my legs and arms.

Q. Was there anything wrong with you at that time? A. No.

[92] Q. Do you know who made the complaint to the Child Welfare Services? A. She wouldn't say.

Q. Was your father there when this interview took place? A. Yes.

Q. Weren't you taken in a separate room from your father? A. I was taken in the bathroom, yes.

Q. And you were separated from your father? A. Yes, he was in the kitchen. And my brothers were in the bedroom.

Q. And they also questioned your brothers at the same time? A. Yes.

Q. And they were in a separate room? A. Yes.

Q. But you don't know who made the complaint or you don't know who was supposed to do this bruising and all the complaint was was that somebody took a complaint out that somebody had bruised you? A. Yes.

Q. They didn't say who it was? A. No.

[93] Q. They didn't say who it was? A. No.

Q. You said that you were scared to tell anybody. A. Yes.

Q. What was the reason that you were scared to tell anybody? A. Because if I would have told anybody they would have told my father and my father would have gotten mad.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. You told your mother and grandmother before? A. Yes.

Q. So there must have been—well, you weren't scared then? A. Yes, I was.

Q. Who were you scared of then? A. My father.

Q. But you did tell them? A. Yes.

Q. And that didn't stop you from telling your mother and grandmother? A. Yes, but they didn't believe me.

Q. Now, you had boyfriends? Isn't that right?

The Commonwealth: Objection. I'd like to come to side bar.

The Court: All right.

[94] (Side bar had off the record.)

The Court: Ladies and gentlemen, we're going to take the noon recess now. So you're excused until two p.m. You report back upstairs. Court will stand in recess until two p.m.

(Luncheon recess.)

* * *

[107] Steedle, do you want to cross examine?

Mr. Steedle: Yes.

CROSS EXAMINATION (CONTINUED):

By Mr. Steedle:

Q. Jeanette, following visitation of the Child Welfare worker which we talked about previously in September of 1978, you went over to the doctor's office with your father? Didn't you? A. Yes.

Q. Who did you talk to over there? Do you recall? A. I don't remember.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. But that's the doctor's office, that was Dr. Fisher's office and his associates over there? A. Yes.

Q. And did you make any complaints to him? A. No.

Q. And in March of 1978, if you can recall now, did someone take you to this same doctor's office for some exposure to TB at school or something like that? A. No.

Q. Do you remember going to that office at all in March of 1978? [108] A. Pardon?

Q. Do you remember your mother taking you over? A. No.

Q. How many times have you gone over to that doctor's office? A. I don't know. I never counted.

Q. Well, I realize that. Was it more than once? A. Yes.

Q. For examination for yourself, I mean? A. I don't know.

Q. Well, you surely would know whether you went over and was examined by the doctor more than once in the last few years?

The Court: Do you remember?
The Witness: No.
The Court: That's her answer. Proceed.

By Mr. Steedle:

Q. Do you remember going to the doctor's office in February of 1978? A. No.

Q. If you had gone, would you remember? A. I remember getting a blood test two times.

Q. Who took you on those occasions? A. My father.

[109] Q. Your father took you? A. Yes.

Q. How long ago was that? A. I don't know.

Q. You don't know? A. No.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. Now, let's refer back to June 20th. And that was the time that your father and yourself and your two brothers were in front of a tavern near the bridge where somebody got gasoline. Do you recall that date, June 20th? Do you recall that? A. Yes.

Q. What time of day was that? A. It was in the afternoon about four, something like that.

Q. Do you remember what you did that morning? A. We woke up from camp.

Q. What was that? A. We woke up from camp and we packed our gear.

Q. I don't mean the following morning. I'm talking about before you went to camping that day. A. I don't remember.

Q. You don't remember where you were at at all that morning or that afternoon? [110] A. No.

Q. You were with your father that day before you went camping? A. Yes.

Q. Did you have the two boys with you, too, all this time? A. Yes.

Q. Isn't it a fact, Jeanette, that your father practically paid 100 per cent attention to the three of you when he had you? A. Pardon?

Q. Didn't your father pay 100 per cent attention to the three of you while he had you? A. Not really.

Q. No? A. No.

Q. What didn't he do? A. He didn't help us with our homework from school.

Q. And was that it? A. It's more than that.

Q. What do you mean. What else? A. Well, we needed help with other things and he couldn't help us out.

Q. Because your father wasn't educated? A. It wasn't that. It was just that he just didn't.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

[111] Q. Do you know how far your father went to school? A. Pardon?

Q. Do you know how far along in school your father had gone? A. He said he went to the eighth grade.

Q. Yes, eighth grade. Is that what he said? A. Yes.

Q. Now, your father and your family lived on relief down in the project? Isn't that correct? A. Right.

Q. And your father didn't carry his money around with him? A. No—well, sometimes he did.

Q. Isn't it true that your father kept the money at home, except for spending money? A. Yes.

Q. So the money that your father was using was used for the household? Wasn't it? A. No.

Q. You mean you went without food? A. No.

Q. Your father had enough food in the home? Isn't that right? A. Sometimes, yes.

Q. Did you expect more? [112] A. No.

Q. Were you satisfied? A. Yes.

Q. Pardon? A. A little bit, yes.

Q. And the fact is that your father made the funds accessible for you to go to the store? Isn't that right? A. Yes.

The Commonwealth: I don't think she understands what the form of the question is.

The Court: Repeat it or rephrase it. You used the word "accessible". Please rephrase the question.

Mr. Steedle: Very well.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

By Mr. Steedle:

Q. You knew where your father had the money at the house? Isn't that right? A. Yes.

Q. And he didn't hide the money or anything like that and if he told you to go to the store you knew where to get the money? Isn't that a correct statement? A. Yes.

[113] Q. Your father had the money at one place all the time? Isn't that correct? A. Sometimes he would change it around to different places.

Q. But you, the oldest child, were informed where the funds were and you knew where the funds were? Is that right? A. Yes.

Q. And isn't it true, Jeanette, also that your father respected your privacy in your own home? Your father didn't neb around in your home? Did he? A. Sometimes, yes.

Q. Did you ever find anything missing that you had in your room?

The Commonwealth: I'm sorry, I have to object. I don't see the relevance of this whole line of questioning.

The Court: I'm going to overrule the objection. You may answer the question.

The Witness: Yes.

By Mr. Steedle:

Q. Pardon? A. I said yes.

[114] Q. What was missing in your room? A. I had a Bible. I had some friends' pictures and I had a radio.

Q. Who bought the radio for you? A. My father.

Q. You mean your father had a radio in your home and he removed it? A. No, he bought it for me.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. What did he use it for after he took it out of your room? Where did he put it? A. I don't know.

Q. Now, these other episodes when you were talking about them, did they all extend three or four hours long like you were talking about the incident on June 11, 1979?

The Court: Just a minute. You'll have to be more definitive other than saying episodes. It's too broad a term. Rephrase your question.

By Mr. Steedle:

Q. You said that your father mistreated you from, from nine o'clock at night to one o'clock in the morning. Now, I'm assuming and you're saying that that's the same thing that happened on all these other times? Is that correct? [115] A. Yes.

The Commonwealth: I have to object. He has to define again what he's talking about when he says "mistreated." He has to define it so she understands what he's talking about.

The Court: Yes. Proceed.

By Mr. Steedle:

Q. Your father made sexual advances on you from nine o'clock in the evening until one o'clock in the morning and you said this happened two and three times a week for three years or more? A. Not all at the same time.

Q. What do you mean? A. He didn't do it that long sometimes.

Q. Sometimes less? A. Yes.

Q. Sometimes more? A. Less.

Q. Sometimes less? A. Yes.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. And what is the least amount of time it occurred? About an hour? A. Yes.

[116] Q. About an hour? A. Yes.

Q. Did your father have an automobile of his own? A. No.

Q. When you told your grandmother and your mother about this affair on June 11, were they together at the time? A. Yes.

Q. Neither one of them believed you? A. Yes, right.

Q. And they told you so? A. Yes.

Q. Now, I wanted to ask you this: Could you tell us maybe within three or four months when you told your grandmother and your mother about this incident? I don't expect you to have the date but can you pinpoint it to a week or so? Was it in June or February or March or April or when? A. I don't know.

Q. Didn't you think it was a serious matter at the time that you talked to them? A. Yes.

Q. But you don't know when it was? A. I'm not sure of the date.

[117] Q. Who did the cooking generally in your house where you live with your father? A. Me and my father used to take turns.

Q. You took turns with your father? A. Yes.

Q. And you're a person that can make a meal, is that what you're saying, for the family? A. Pardon?

Q. You are able to make a meal for the family? Is that what you are saying? A. Yes, sometimes. It all depends on what it is.

Q. Who gave you the Bible? You said you had a Bible. Is that correct? A. Yes.

Q. Who gave you the Bible? A. I got it from this lady. She worked for the Children's—well, the Children's Bible Group.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. And when it was missing did you ask your father? A. No.

Q. Did you tell your father that you ever had a Bible? A. No, but he said that he burnt his Bible.

Q. What brought that up in your father? Why would your father tell you that he burnt his Bible? [118] A. I don't know.

Q. Do you remember the conversation in which this was raised and why it was brought up? A. I asked him if I could go to church one day. He said he didn't want to talk about it. I asked him if he ever had a Bible. He said yes, and I burnt it.

Q. How long ago was that? A. When he was living in—well, that's when we was living in 13B McKees Rocks Terrace.

Q. That was sometime after September when you were transferred from school, from one seventh grade to the other? A. Yes.

Q. Now, you said you visited your relatives a lot over the year? Isn't that right? A. Yes.

Q. Which people did you visit? A. I visited his sisters, Arlene, his brother, Louis, his mother and—

Q. That would be your grandmother? A. Right. That was all.

Q. Did you ever visit Mrs.—I think she's called—did you ever visit Mrs. Josephine Aubrey (phonetic)? [119] A. No.

Q. Did she ever visit you? A. Yes.

Q. All right. A. I can remember that she visited us on the North Side once or twice.

Q. How often did you visit with Mr. Ritchie's father? A. About every two weeks.

Q. That was continuing while you lived in McKees Rocks? A. We was over on the North Side, yes, too.

Q. Over on the North Side also? A. Yes.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. Now, how old were you when this first started, as far as sexual attacks by your father? A. I don't remember.

Q. You visited Betty Daley and her two daughters—I mean her daughter—you visited them very often? A. Pardon?

Q. Cherie and her mother, Betty Daley, the ones you testified about. Did you visit them very often? A. No.

Q. You didn't visit them very often? [120] A. No.

Q. How often did you visit them? A. We never did because my dad never got along with her husband.

Q. Did you go down there by yourself at times? A. Me?

Q. Yes. A. No.

Q. Did you have a bicycle? A. Yes.

Q. Where did you take your bike? A. I rode it around the terrace.

Q. You never went down into the McKees Rocks area? A. No.

Q. Did you ever complain to your father's father about your dad's drinking? A. Yes.

Q. When? A. I don't remember when.

Q. How often did you make the complaint? A. I only made it twice, it was to his mother.

Q. That was all through this whole period of time that you were living with your father? A. Yes.

Q. Now, getting back to the 20th, Jeanette, that's [121] the date that you took the first trip to Washington County to go overnight there. Do you recall what time you got down to the bottoms, what they call the bottom of McKees Rocks from your home? Was it one o'clock in the afternoon or when? A. I don't remember.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. Do you recall how long after the gasoline was put in the car that day that you did start the trip to Washington, Pennsylvania? Do you remember? A. About five minutes after.

Q. Five minutes later? A. Yes.

Q. In other words, you're saying that as soon as the car was gassed up, that everybody went to Washington, Pennsylvania? A. Yes.

Q. And your father was in a stupor at the time? Is that what you're saying? A. Pardon?

Q. You said your father was mumbling to himself at the time? Is that what you said? A. Yes.

Q. Who put the tent up once you got down there? [122] A. Well, he didn't put the tent up because it was too dark when we got there.

Q. You mean he didn't put the tent up at all that night? A. No.

Q. Are you saying that you just slept on the open ground? A. No. We laid the tent flat. We slept on that.

Q. You laid on the tent itself? A. Yes.

Q. And that was you and your two brothers? A. Yes.

Q. And your father? A. Yes.

Q. And Johnny? A. Johnny and my father was out a little way from the tent, you know, and we were on the tent, me and my two brothers.

Q. Now, do you remember this day, the 20th, when you went down to Washington, Pennsylvania? A. Yes.

Q. What did you do when you were there before you went to sleep? A. We went to his Uncle Burrell's house and asked—well, he asked if he can go to his cabin to [123] stay and he said that he can't because it is locked up.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. Isn't it a fact that it rained that night? A. Pardon?

Q. Isn't it a fact that it rained that night? A. Yes.

Q. And you slept on the canvas without a cover? Is that what you're saying? A. We had a cover.

Q. What kind of a cover did you have? A. I can't remember directly what it was made of.

Q. I mean, are we talking about a blanket or something? A. Yes, a heavy one.

Q. A heavy one? A. Yes.

Q. You had a heavy blanket and you covered your head and everything? A. Yes.

Q. It was raining all around you and you were just laying on the canvas? A. Yes.

Q. How long did it rain? A. I don't know. I was sleeping.

Q. You slept through all of this rain? [124] A. Yes.

Q. When you were down there, did you tell Johnny about what you told Cherie? A. No.

Q. Did you tell Chuckie who was driving the car what you told Cherie? A. I told him some things, yes.

Q. When? A. When I seen him.

Q. On this particular day, the 20th, did you tell him? A. Yes.

Q. All right. A. Well, my father and Johnny went into a bar out in Washington to get some beer.

Q. So you told him then? A. Yes.

Q. Did you also tell him not to tell anybody? A. Yes.

Q. How old is this Chuckie? A. He's in his twenties.

Mr. Steedle: That's all I have.

The Commonwealth: I have some questions.

The Court: Proceed.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

[125] REDIRECT EXAMINATION

By the Commonwealth:

Q. I just want to clear up one thing, Jeanette. Mr. Steedle asked you about seeing people from the Child Welfare Agency when they came to your home. Do you remember that? A. Yes.

Q. Do you remember when they came to your home? Do you remember how long ago it was? A. I think it was in '78.

Q. Do you know when in '78? A. No.

Q. Could it have been any time that year? A. Yes. It was in the summer.

Q. What were they asking you? A. If we got beat up. They checked my brothers and that for bruises.

Q. Did anybody ask you anything about the fact that anyone was having sex with you? A. No.

Q. They didn't ask you any of those kind of questions? A. No.

Q. Did you tell any of those people from that agency [126] about the incidents that were happening with your father? A. No.

Q. You didn't tell them what was happening? A. No.

Q. How come you didn't tell them? A. I don't know.

Q. You were in the seventh grade now? A. Yes.

Q. And last year then, the grade that started in September of '78, that would also have been the seventh grade for you? A. Yes.

Q. And the year before that, of course, you were in the sixth grade? A. Well, I was ending the sixth grade.

Q. You were ending the sixth grade? A. Yes.

Q. Did you repeat any grade beside the seventh grade? A. No.

Appendix G—Excerpts from Notes of Testimony, Dated November 7, 1979.

Q. Okay. A. Not that I know of.

Q. So, you are in the seventh grade now and you're repeating it for the first time? [127] A. Yes.

The Commonwealth: That's all I have.

Mr. Steedle: I'm through, Your Honor. I have no recross.

The Court: You may step down.

Call your next witness.

* * *

APPENDIX H

Pretrial Hearing on [Respondent's] Motion for Sanctions, Dated October 23, 1979 (Unabridged)

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff,

vs.

GEORGE F. RITCHIE,
Defendant.

CRIMINAL DIVISION
CC 7903887.

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1. Rape
2. Involuntary Deviate Sexual Intercourse
3. Incest
4. Corruption of Minor

Excerpt Transcript

Filed by:
(Miss) Ollie M. Holden
Official Court Reporter

Trial Date:
October 23, 24 & 25, 1979

Trial Judge:
Hon. Samuel Strauss, J., and Jury

Appendix H—Pretrial Hearing on [Respondent's] Motion for Sanctions, Dated October 23, 1979.

COUNSEL OF RECORD

For the Commonwealth:
DISTRICT ATTORNEY
301 Courthouse
Pittsburgh, Pa. 15219
By: Gary Truitt, Esq.
Assistant District Attorney

For the Defendant:
JOSEPH A. STEEDLE, ESQ.
3064 Chartiers Avenue
Pittsburgh, Pa.
By: Joseph A. Steedle, Esq.

[2] Pittsburgh, Pennsylvania
October 23, 1979

(The following proceedings occurred in Judge's chambers:)

Mr. Steedle: This case, Your Honor, is a statutory rape case, incest, and at the pre-trial omnibus motion before Judge Popovich I raised the issue with the District Attorney to secure the file of the Child Welfare Services for inspection.

The Court: Yes.

Mr. Steedle: At that time, Judge Popovich ruled that would be handled by the trial Judge.

The Court: Yeah.

Mr. Steedle: All right. Now this case was set for trial—

The Court: Yes.

Mr. Steedle: —on October 16. On October 16 I had a subpoena served on the Child Welfare Services bringing their records to the courtroom.

The Court: Yeah.

Mr. Steedle: They failed to show.

The Court: All right. Are they here now?

Mr. Steedle: They are here now.

[3] The Court: So it is over with.

Mr. Steedle: I filed a motion for sanctions.

The Court: Sanctions for who?

Mr. Steedle: Against the Child Welfare Services for failure to appear twice. The second time it was served—

The Court: It should have been here.

Mr. Steedle: The second time they threw the papers in the elevator shaft.

The Court: Pardon me?

Mr. Steedle: They just threw the papers in the elevator shaft.

Mr. Truitt: Your Honor,—

Mr. Shenosko: Your Honor, if I may interrupt, I think we can get to the issue. The issue is this, that the trial of the case—I mean the Child Welfare is only in the periphery of this matter.

The Court: I don't know what they have got to do with it.

Mr. Shenosko: My name is George Shenosko (sic.). I am an Assistant County Solicitor and I represent Child Welfare. The issue is whether or not the records of Child [4] Welfare should be involved in this case. Now we take the position there is really nothing in these records which

is of any import to the case. Secondly, we take the position that if an inspection of the records is deemed advisable, it is the duty of the Court to give an in camera inspection. Basically these records are confidential records.

The Court: There is no question about that. I mean, I would assume that.

Mr. Shenosko: There is authority for this. We have a miscellaneous order of the Supreme Court.

The Court: I am satisfied that this is the correct way to do it. Do you have something there that we can look at? I mean, yeah.

Mr. Steedle: One thing I say, it is essential to the trial of this case.

The Court: Pardon me?

Mr. Steedle: There is possible witnesses available out of those reports.

The Court: I don't see any witnesses in here. Yeah, I mean.

Mr. Steedle: There is a medical report in that file that I know about.

[5] The Court: What is it that you know from the medical report?

Mr. Steedle: The girl was examined by a doctor in September, 1978.

The Court: All right. Keep your voice down. There is a jury upstairs. So what?

Mr. Steedle: This girl, whether mistreated by her father for three years prior to this, when she was examined by doctors six months—well, it was a year ago now—

The Court: They didn't have a doctor along every time she was misused or—

Appendix H—Pretrial Hearing on [Respondent's] Motion for Sanctions, Dated October 23, 1979.

Mr. Steedle: No, no, no. I'd like to see the doctor's report.

The Court: No, no. Can you locate whatever he is talking about, the examination?

Unidentified Woman: It is not there.

The Court: There is nothing in here about a doctor's examination.

Mr. Steedle: Well, there may not be anything there, but they have it because—

The Court: Well, are these your records?

Mr. Shenosko: Those are the records of the agency.

[6] Miss Muller: The activity that—

Mr. Truitt: Identify yourself.

Miss Muller: Barbara Muller, Children and Youth Services. He is talking about activity with his family prior to when Child Welfare was involved in it.

The Court: Came into the picture.

Mr. Steedle: I'm not talking about that, Your Honor.

The Court: What are you talking about?

Mr. Steedle: Child Welfare Services.

The Court: What specific date, what records do they have that you are talking about?

Mr. Steedle: I'll get my file.

The Court: All right. What specifically are you talking about?

Mr. Steedle: That girl was given—

The Court: Stephen Fisher, M.D. To whom it may concern, Jeanette Ritchie was seen in the office today. A routine physical examination. And this was dated 9-6-78.

Mr. Steedle: That is what I want to see. That physical examination was taken on behalf of Child Welfare Services. Somebody was supposed to—

Appendix H—Pretrial Hearing on [Respondent's] Motion for Sanctions, Dated October 23, 1979.

[7] The Court: What do you want to—when was the offense allegedly?

Mr. Steedle: For three years starting June of this year going back three years.

Mr. Truitt: We have discovered late June of—

The Court: June of this year?

Mr. Truitt: Right.

The Court: What would this—

Mr. Steedle: The charges say these things were occurring twice a week for three years.

The Court: Well, how are you going to tell? Is there some sort of a meter that would indicate how many times a week this thing you are talking about occurs? I don't know.

Mr. Steedle: All I know is that the Child Welfare Services received a complaint someone was mistreating this girl. They went down and interviewed the girls, and they asked the father—they gave the father a report to take her to a doctor and have the doctor examine this girl.

The Court: Is this the doctor?

Mr. Steedle: That is the doctor. He went to—and we got a statement from the doctor. [8] We took the form over to him, and this was a Child Welfare Services form, by the way, Your Honor.

The Court: Yeah.

Mr. Steedle: And it was done on behalf of Child Welfare Services.

The Court: That is your allegation. I mean, I don't know.

Miss Muller: Your Honor, both records—one record on the child, and the other is on the family. Both records

indicate the case was referred to Children and Youth Services June 22, 1979. It shows no prior activity with Children and Youth Services.

The Court: That is the answer. They don't have anything.

Mr. Steedle: I know there is, Your Honor.

The Court: Counsel, I'm not interested in what you know because I am only interested in the record isn't here. There are no records, they tell us.

Mr. Steedle: For the record, we are going to be testifying to that.

The Court: What do you mean, "we are going to be testifying"?

[9] Mr. Steedle: That the Child Welfare Services had a person down there and take the child over—

The Court: You mean you got somebody to testify to that?

Mr. Steedle: The father.

The Court: Is the father the defendant in this case?

Mr. Steedle: Yes.

The Court: All right. So I don't care what he testifies to.

Mr. Steedle: But we'd like to have the record on the—

The Court: Look, counsel. Don't get yourself emotionally involved. You are in the same role that the Court is. I don't know a damned thing about this case. I didn't send for it. It rolled off of the list and it is here. Now I want everybody that comes into this courtroom to get a fair trial, and they are going to. But I mean I have an old habit that I have difficulty getting rid of. That is the habit of letting someone else run my courtroom when I'm sitting here with the responsibility.

[10] Mr. Steedle: I'm not attempting—I'm trying to make a point.

The Court: These good people are here. This is a public agency. Their records are here. Now they say they have no record, then that is all there is to it.

Mr. Steedle: The other thing is this. Whether or not their records would disclose witnesses that are not known to this defendant.

The Court: What kind of witnesses?

Mr. Steedle: I don't know. Could be lots of witnesses.

The Court: I don't know what you are asking for.

Mr. Steedle: There could be defense witnesses disclosed by their records here. There could be matters in there that would be favorable to the defendant.

The Court: Well, there could be anything. It could be in a telephone book, correspondence in Carnegie museum.

Mr. Steedle: I think that we are entitled—

The Court: No, you are not entitled because you are not making specific allegations [11] that can be verified or determined. I mean, to throw these Child Welfare records open to the public would make no sense at all.

Mr. Steedle: I am not the public, Your Honor. I have to represent—

The Court: If it comes out in the trial, it is the public. They have answered your question. They have no medical examination that you are referring to at the time you are talking about, no record of it. That is all there is to it. Let's get ready for trial.

Mr. Shenosko: Thank you, Your Honor.

The Court: Now will you remain—I mean maybe we better have it—

Mr. Steedle: Would you overrule this. I'm going to file it.

The Court: You don't have to go down and file it. We will be ready to go on the case. We will allow you to file it. No question about that. Get Reabe in here. Will you make a—write up an order on here, after hearing on the above motion in chambers, the Court has the information given to the Court indicates there has been no medical records that have been kept [12] by the agency that would be of help to the defendant in this matter.

Mr. Shenosko: Thank you.

The Court: Then we will sign the order.

Mr. Truitt: I have one other pre-trial matter.

The Court: What is that?

Mr. Truitt: Did you have any other pre-trial motions to make?

Mr. Steedle: The only other thing is we have a stipulation of the birth certificate of Jeanette Bills will be entered in the record.

Mr. Truitt: We have a correct copy of a birth certificate. We don't have any problem with that. One thing I want to point out to the Court is that the information charges these acts happening various dates 1976, '77, '78, and specifically on June 11, 1979. The only date we will proffer precisely is June 11, 1979. We can prove incest happened on that day and will prove it happened many times beforehand, and the girl cannot specify which dates.

The Court: That is allowed under the law.

Mr. Truitt: What I would like to do right [13] now since the statute of limitations in this offense is two years and this was discovered in June, 1979, I should move to amend the information to reflect that the jury would only consider acts which happened from June, 1977, on.

The Court: Yeah. Well, that is appropriate.

Mr. Truitt: That has nothing to do with the proof.

There is authority for showing when it all started, but I think the information should be limited to two years.

The Court: Yeah. All right. The motion is allowed.

Mr. Steedle: At this time I think that—well, I think I am a little premature on this, but I would like to have the Court consider dismissal of the incest charges in view of the agreement that we have that the birth certificate will be entered in the record. The statute calls that the birth certificate problem facing proof of the statement of the birth certificate and the father being charged here is not the father on the birth certificate.

The Court: The father is not the father [14] on the birth certificate.

Mr. Truitt: That will be one of the issues. The birth certificate which I have obtained from the Department of Vital Statistics shows the girl's name is Jeanette Bills. The defendant's name is George Ritchie.

Mr. Steedle: We also—

The Court: Just a minute.

Mr. Truitt: At the time the girl was born, the girl's mother was married to Thomas Bills. She wasn't living with him but was married to him. The girl's mother will appear in Court and will testify that George Ritchie is the father of the child and that she only reported the name Thomas Bills because she was told she was to record the man she was married to. The birth certificate, I have no problem with the defense using as evidence. The certificate is certainly evidence that can be offered.

Mr. Steedle: I don't think he is in a position to make who is the father of the child.

Mr. Truitt: The mother will testify George Ritchie is the father of the child.

Mr. Steedle: In view of the fact this [15] is prima facie—

Appendix H—Pretrial Hearing on [Respondent's] Motion for Sanctions, Dated October 23, 1979.

The Court: This is back to what year?

Mr. Truitt: 1966.

The Court: When the child was born.

Mr. Truitt: Was born. And Thomas Bills will also appear and testify he had no access to the mother at the time necessary.

The Court: And now, October 23, 1979, after hearing in chambers, the Court having viewed the records of the Child Welfare Services, the Court finds that no medical records are being held by the Child Welfare Services that would be of benefit to the defendant in this case. Counsel for the Commonwealth, and the defendant, and a representative of the Child Welfare Services being present at this hearing.

Mr. Steedle: I don't think the Court has reviewed the records, Your Honor.

The Court: All right, that is it.

Mr. Steedle: Object to that order because the Court did not review the records.

The Court: We didn't read 50 pages or more of an extensive record. We have asked for the medical records. There were no medical records [16] that the Court reviewed, and that is what we were told. Yeah. All right.

Mr. Steedle: So this birth certificate business will be an issue for the jury to decide. We will have no trouble since that is the birth—that is the proper birth certificate.

Mr. Truitt: No problem with that.

The Court: All right.

(End of Judge's chambers proceedings.)

APPENDIX I

Motion for Sanction

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

vs.

GEORGE F. RITCHIE.

No.: CC 7903887A.

On October 16, 1979, Arlene Kosol, an adult, served a Subpoena upon the custodian of the records of Jeanette Bills, a/k/a, Jeanette Ritchie, to appear in Court at 9:00 A.M. on October 17, 1979 and to bring with her the records of the Child Welfare Services pertaining to the said Jeanette Bills, a/k/a Jeanette Ritchie.

At 8:45 A.M. on October 17, 1979, this attorney, Joseph A. Steedle, called on the offices of said Child Welfare Services to discuss the matter of the Subpoena. The personnel of said Child Welfare Services absolutely refused to discuss the matter of the Subpoena and refused to recognize the authority of the Subpoena. No person of the Child Welfare Services appeared before the Court with records or to contest the legitimacy of the Subpoena.

Appendix I—Motion for Sanction.

On October 18, 1979 a Subpoena was again served upon Child Welfare Services to produce their records as to Jeanette Bills, a/k/a, Jeanette Ritchie, before the Court, and answer this Motion.

It is essential and necessary for the preparation and defense of this case that counsel examine the records pertaining to Jeanette Bills, a/k/a, Jeanette Ritchie, at a reasonable time prior to trial.

WHEREFORE, it is moved that the Child Welfare Services produce the records immediately of the said Jeanette Bills, a/k/a, Jeanette Ritchie, for the inspection and reproduction by Joseph A. Steedle, counsel for the defendant, for the sole purpose of the trial of this case and that sanctions as may be determined by the Court be directed to Child Welfare Services.

JOSEPH A. STEEDLE
Joseph A. Steedle
Attorney for Defendant

APPENDIX J

Motion and Application for Discovery

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

vs.

GEORGE F. RITCHIE.

No.: CC 7903887A.

Pursuant to Rule 305 of the Pennsylvania Rule of Criminal Procedure, George F. Ritchie, by his attorney, Joseph A. Steedle, Esquire, makes his Motion and Application for Discovery as hereafter set forth. A good faith effort to discuss and secure the disclosures has taken place and proved unsuccessful.

1. Disclose to defendant's attorney all of the following requested items or information, material to the case, and when applicable to inspect and copy or photograph such items.

(a.) Any evidence favorable to the accused which is material either to guilt or to punishment, and which is within the possession or control of the attorney for the Commonwealth;

(b.) any written confession or inculpatory statement, or the substance of any oral confession or inculpatory

statement, and the identity of the person to whom the confession or inculpatory statement was made, which is in the possession or control of the attorney for the Commonwealth;

(c.) the defendant's prior criminal record;

(d.) the circumstances and results of any identification of the defendant by voice, photograph, or in-person identification;

(e.) results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph examinations or other physical or mental examinations of the defendant, which are within the possession or control of the attorney for the Commonwealth;

(f.) any tangible objects, including documents, photographs, fingerprints, or other tangible evidence;

(g.) results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph examinations or other physical or mental examinations of Jeanette Biles.

(h.) The time and place of each offense for which the defendant is being tried.

2. Furnish the following:

(a.) the names and addresses of eyewitnesses;

(b.) all written or recorded statements, and substantially verbatim oral statements, of eyewitnesses the Commonwealth intends to call at trial.

3. Stipulate the admission of the birth certificate of Jeanette Biles setting forth the names of her parents.

JOSEPH A. STEEDLE
Joseph A. Steedle
Attorney for Defendant

And now Oct 9, 1979 Motion for Pre-Trial Discovery heard in open court.
Eo die District Attorney (illegible) provided defense with all relevant information (illegible) on in this motion.
Eo die District Attorney is ordered to provide defense with any medical records he has in his possession.

BY THE COURT

POPOVICH, *J.*

Gary Truitt ADA
Joseph Steedle Def.
Janet Britlin Rep.

APPENDIX K

Information

IN THE COURT OF COMMON PLEAS
COUNTY OF ALLEGHENY
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

vs.

GEORGE F. RITCHIE.

Criminal Action No.: CC 7903887A.

The District Attorney of Allegheny County by this information charges that on (or about) divers dates in 1976, 1977, 1978 and ending on June 11, 1979, in the said County of Allegheny GEORGE F. RITCHIE, hereinafter called actor, did commit the crime or crimes indicated herein; that is:

31210A Count 1 RAPE Felony 1

The actor engaged in sexual intercourse with Jeanette Bills Ritchie not his spouse, by forcible compulsion, or threat of forcible compulsion, in violation of Section 3121(1) of the Pennsylvania Crimes Code, Act of December 6, 1972, 18 Pa. C.S. Section 3121(1).

Appendix K—Information.

31230A Count 2 INVOLUNTARY DEVIATE SEXUAL INTERCOURSE Felony 1

The actor engaged in deviate sexual intercourse per os or per anus with Jeanette Bills Ritchie, a child below the age of sixteen, not his spouse, by forcible compulsion in violation of Section 3123(1) of the Pennsylvania Crimes Code, Act of December 6, 1972, 18 Pa. C.S. Section 3123(1).

43020R Count 3 INCEST Misdemeanor 1

The actor knowingly had sexual intercourse with another, namely, Jeanette Bills Ritchie, a descendant, in violation of Section 4302 of the Pennsylvania Crimes Code, Act of December 6, 1972, 18 Pa. C.S. §4302.

63010A Count 4 CORRUPTION OF MINORS Misdemeanor 1

The actor, being 18 years of age and upwards, corrupted or tended to corrupt the morals of Jeanette Bills Ritchie a child under the age of 18 years, by the act of engaging in sexual relations, including oral intercourse, with the said child over a period of several years while the child was in the care of the defendant, in violation of Section 6301 of the Pennsylvania Crimes Code. Act of December 6, 1972, 18 Pa. C.S. Section 6301.

All of which is against the Act of Assembly and the peace and dignity of the Commonwealth of Pennsylvania.

ROBERT E. COLVILLE
By C. G. COPETAS
Attorney for the Commonwealth

C3253 August 17, 1979

No. 85-1347

IN THE

Supreme Court of the United States

October Term, 1985

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

GEORGE F. RITCHIE,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR PETITIONER

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Question Presented for Review

Do either the Confrontation or Compulsory Process Clauses of the Sixth Amendment invariably require, as the Supreme Court of Pennsylvania has concluded, the pretrial disclosure of confidential child protective service records to a defendant in a state rape-incest prosecution on the strength of his speculative claim of need and notwithstanding the fact that the records were neither possessed nor employed by the prosecutor at any stage of the criminal proceeding?

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BRIEF FOR PETITIONER

Opinions Below

The Opinion of the Supreme Court of Pennsylvania (Pet. for Cert. App. A) is reported at _____ Pa. _____, 502 A.2d 148 (1985). The Opinion of the Superior Court of Pennsylvania (Pet. for Cert. App. B) is reported at 324 Pa. Super. 557, 472 A.2d 220 (1984).

Statement of Jurisdiction

The Judgment of the Supreme Court of Pennsylvania was entered December 11, 1985 (Pet. for Cert. 48a). The petition for writ of certiorari was filed February 10, 1986, and certiorari was granted May 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Constitutional Provisions

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Pennsylvania Statute Involved

Act 1975, November 26, P.L. 438, No. 124, §15 provides:

> Confidentiality of Records.
>
> (a) Except as provided in section 14, reports made pursuant to this act including but not limited to report summaries of child abuse made pursuant to section 6(b) and written reports made pursuant to section 6(c) as well as any other information obtained, reports written or photographs or x-rays taken concerning alleged instances of child abuse in the possession of the department, a county public child welfare agency or a child protective service shall be confidential and shall only be made available to:
>
> (1) A duly authorized official of a child protective service in the course of his official duties.
>
> (2) A physician examining or treating a child or the director or a person specifically designated in writing by such director of any hospital or other medical institution where a child is being treated, where the physician or the director or his designee suspect the child of being an abused child.
>
> (3) A guardian ad litem for the child.
>
> (4) A duly authorized official of the department in accordance with department regulations or in accordance with the conduct of a performance audit as authorized by section 20.
>
> (5) A court of competent jurisdiction pursuant to a court order.

* * *

Statement of the Case

A. Statement of the Proceedings

Respondent, George F. Ritchie, was charged by Information filed August 17, 1979, in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, with Rape,[1] Involuntary Deviate Sexual Intercourse,[2] Incest,[3] and Corrupting the Morals of Minors[4] in four respective counts. The matters were tried to a jury, and on November 13, 1979, respondent was adjudicated guilty as charged.

Respondent was sentenced January 8, 1981, to terms of incarceration of three (3) to ten (10) years for Rape and Involuntary Deviate Sexual Intercourse, to be served concurrently; additional terms of two and one-half (2½) to five (5) years were imposed at the remaining counts, also to be served concurrently with those imposed at Counts One and Two.

On February 3, 1984, the Superior Court of Pennsylvania rejected respondent's appellate claims regarding the evidentiary sufficiency of the prosecution's case and the trial court's disposition of certain evidentiary matters not here relevant. However, the judgments of sentence were vacated, and the case was remanded to the trial court with directions to "review

[1] 18 Pa. C.S. §3121 (Pennsylvania Crimes Code). Rape is a felony of the first degree punishable by a term of imprisonment, the maximum of which is more than ten (10) years. 18 Pa. C.S. §106(a)(2).

[2] 18 Pa. C.S. §3123. Involuntary Deviate Sexual Intercourse is a felony of the first degree.

[3] 18 Pa. C.S. §4302. Incest is a misdemeanor of the first degree punishable by a term of imprisonment not to exceed five (5) years. 18 Pa. C.S. §106(a)(6).

[4] 18 Pa. C.S. §6301. Corruption of Minors is a misdemeanor of the first degree.

the CWS records *in camera* to determine whether they contain any statements made by Jeanette regarding abuse." *Commonwealth v. Ritchie,* 472 A.2d at 226 (Pet. for Cert. 45a). Respondent—through counsel—was then to be permitted to review, in their entirety, those records to which he had been denied pretrial access "in order to argue the relevance of the material in accordance with [the trial judge's] decision." *Id.,* 472 A.2d at 226 (Pet. for Cert. 46a).

The Commonwealth thereafter sought further appellate review of the Superior Court's remand order. The question presented and argued to the Supreme Court of Pennsylvania was "[t]o what extent may a defendant in a child rape-incest prosecution be authorized pretrial access to records or files prepared pursuant to the reporting requirements of the child protective services law for his possible use at trial to impeach or discredit a witness-victim?" (Brief for Appellant at 3, *Commonwealth v. Ritchie, supra*).

The Supreme Court of Pennsylvania, by an Order dated December 11, 1985, affirmed the Superior Court's disposition of the case (Pet. for Cert. 48a), persuaded apparently by respondent's contention that the trial court's denial of his pretrial request for production of the disputed materials deprived him of his rights to confrontation and compulsory process guaranteed by the Sixth Amendment. *Commonwealth v. Ritchie,* 502 A.2d at 153 (Pet. for Cert. 12a). The trial court was directed to grant defense counsel's access to the child protective service files in order "to argue to the trial court what use, if any, could have been made of the files in cross-examining the complainant *or in presenting other evidence.*" *Id.,* 502 A.2d at 153-54 (Pet. for Cert. 12a-13a). (Emphasis supplied).

B. Statement of the Facts

The charges against respondent arose following the disclosure by his then thirteen-year-old daughter Jeanette, made in confidence to an older cousin, that she had been subjected to her father's sexual depredations over a period of about four (4) years (NT 33-35, 50, 132-133; JA 14a-15a, 24a).[5] The cousin shared this confidence with her mother, the victim's aunt (NT 133-134), who ultimately escorted the victim to police headquarters where a formal complaint was made (NT 52-55; JA 25a-27a). Specifically, the victim alleged that on June 11, 1979, respondent forced her to fellate him and then compelled her to submit to vaginal intercourse (NT 24-27, 32-34; JA 8a-11a, 13a-15a).

In pretrial pleadings, respondent initially sought discovery from the Commonwealth of "results or reports of scientific tests, expert opinions . . . or other physical or mental examination of Jeanette Biles [*sic*]." (JA 76a). Thereafter respondent subpoenaed Child Welfare Services (CWS)[6] for "records pertaining to Jeanette Bills, a.k.a. Jeanette Ritchie." *Ibid.* Apparently meeting with no success, respondent—through counsel—filed a pleading captioned Motion for Sanction, averring, *inter alia*, that CWS personnel "absolutely refused to recognize the authority of the subpoena." (JA 73a).

[5] Transcript of notes of testimony at trial, November 7, 1979.

[6] CWS is the Allegheny County child protective service agency charged with the responsibility of monitoring and investigating reports of suspected child abuse. The agency has since been redesignated as Children and Youth Services (CYS).

The trial judge convened a pretrial conference, in chambers, to hear argument on the motion. In the course of the proceeding, counsel for respondent attempted to persuade the court that:

> There is possible witnesses available out of these reports. [sic] . . . There is a medical report in that file that I know about. The girl was examined by a doctor in September, 1978. I'd like to see the doctor's report. . . . That physical examination was taken on behalf of Child Welfare Services. All I know is that [CWS] received a complaint someone was mistreating this girl. They went down and interviewed this girl . . . and they asked the father . . . They gave the father a report [form?] to take her to a doctor and have the doctor examine this girl. The other thing is this. Whether or not their records would disclose witnesses that are not known to this defendant [sic]. . . . There could be defense witnesses disclosed by their records here. There could be matters in there that could be favorable to the defendant.

(HT 4-6, 10; JA 65a-66a, 69a).[7]

CWS, represented at the pretrial proceeding by an Assistant County Solicitor and an agency record custodian, explained that the agency's files contained no records of a medical examination of the victim (HT 5; JA 65a-66a). Respondent's counsel, however, insisted that ". . . there may not be anything [in these files], but they [CWS] have it. . . ." *Ibid.* The Assistant County Solicitor

[7] Transcript of hearing on pretrial Motion for Sanction, October 23, 1979. This hearing was not part of the appellate record before the Superior Court prior to its February 3, 1984, judgment and order. The proceeding was recorded but not transcribed until February, 1984, at the request of the Commonwealth. Subsequently, the transcript was made a part of the record reviewed by the Supreme Court of Pennsylvania.

responded, "Those are the records of the agency." *Ibid.* The CWS record custodian informed the trial judge that the agency's involvement with the victim did not commence until June 22, 1979 (HT 6, 8; JA 67a, 67a-68a). With respect to the non-medical materials sought by respondent's counsel, the trial court observed that "... you are not entitled [to review the agency files] because you are not making specific allegations that can be verified or determined." (HT 10-11; JA 69a-70a). The trial judge concluded that the medical records did not exist and entered the following Order:

> And now, October 23, 1979, after hearing in chambers, the Court having viewed the records of the Child Welfare Services, the Court finds that no medical records are being held by [the agency] that would be of benefit to the defendant in this case. Counsel for the Commonwealth, and the defendant, and a representative of the [agency] being present at the hearing.

(HT 15; JA 72a). Respondent's counsel immediately objected to the Order, saying that "the court did not review the records." The trial judge retorted, "We didn't read 50 pages or more of an extensive record. We have asked for the medical records. There were no medical records that the court reviewed, and that is what we were told." (HT 15-16; JA 71a-72a).

In directing the trial court to reconvene a hearing and to grant counsel access to the disputed records, ostensibly for the narrow purpose of arguing their relevance in accordance with the trial court's *in camera* determination, the Superior Court cited *Davis v. Alaska*, 415 U.S. 308 (1974), for the proposition that where there is tension between a defendant's right of confrontation and a state's interest in insuring the confidentiality of sensitive records, a delicate balancing must occur. The

court concluded, however, "that the need for confidentiality in this case must ... yield to appellant's right of confrontation." *Commonwealth v. Ritchie*, 472 A.2d at 225 (Pet. for Cert. 42a-43a).

The Supreme Court of Pennsylvania's affirmance was premised on the Sixth Amendment "counters" of the right of the accused to confront the witnesses against him and to have compulsory process for obtaining witnesses in his favor, *Commonwealth v. Ritchie*, 502 A.2d at 151 (Pet. for Cert. 8a). Following a review of several of this Court's decisions in which Sixth Amendment questions were presented, the Pennsylvania Court concluded that *Davis v. Alaska* was the federal decision which was dispositive of the controversy. Applying *Davis*, the court held that the "counters" of confrontation and compulsory process tipped in favor of the respondent. *Id.* at 502 A.2d at 152-153 (Pet. for Cert. 10a, 12a).

Summary of the Argument

In 1979, respondent was charged with various sexual offenses, including rape and incest, involving his then thirteen-year-old daughter. Prior to trial, defense counsel sought court permission to review certain child protective service records concerning the victim and her family which the county agency had declined to surrender on the authority of a confidentiality provision in the Pennsylvania child protective services law. Counsel's request was rebuffed by the trial court following a preliminary review of the records, *in camera*, for evidence of a medical examination of the child-victim believed by counsel to have taken place some nine months before respondent's arrest. The Court concluded that the medical examination was not in the child's file, and counsel's explanation that the records might contain potential witnesses or information useful or otherwise favorable to the defense was rejected as too vague and speculative.

A. The Supreme Court of Pennsylvania's conclusion that the pretrial denial of defense access to presumptively confidential records was a violation of rights protected by the Confrontation Clause was erroneous, based as it was on a misinterpretation of *Davis v. Alaska*. The Pennsylvania Court incorrectly assumed that the constitutional flaw in *Davis* was the trial court's pretrial protective order precluding discussion of a prosecution witness' juvenile record. In fact, this Court faulted the trial court in *Davis* for the limitation it later imposed *at trial* on the scope of defense counsel's cross-examination. *Id.*, 418 U.S. at 312-14.

The right to confrontation is basically a trial right. *Barber v. Page*, 390 U.S. 719, 725 (1968). The privilege is not properly invoked at pretrial proceedings not involving guilt or innocence. *McCray v. Illinois*, 386 U.S.

300, 311 (1967). The Confrontation Clause protects an accused's literal right to confront adverse witnesses at trial and to subject their testimony to cross-examination as a means of exposing the fact-finder to potentially unfavorable inferences regarding the witness' credibility or the substance of the prosecution's case. *Delaware v. Fensterer*, _____ U.S. _____, 106 S.Ct. 292, 294 (1985) (*per curiam*).

In the present case, the prosecutor made no contested attempt to employ hearsay, and the trial court placed no pretrial limitation on the breadth of cross-examination (NT 56-93, 107-127; JA 27a-49a, 49a-61a). The Supreme Court of Pennsylvania erroneously and prematurely applied the Confrontation Clause analysis in the context of a *pretrial* order restricting respondent's *pretrial* access to presumptively confidential records.

B. The Supreme Court of Pennsylvania's conclusion that the pretrial disclosure of the child protective service records was constitutionally compelled is clearly erroneous in view of respondent's failure preliminarily to establish the materiality, in the constitutional sense, of any of the information contained in those records.

This Court's seminal decision in *Washington v. Texas*, 388 U.S. 14, 23 (1967), contained intimations that a violation of the constitutional right to compulsory process could not be established in the absence of a preliminary showing that the evidence sought was relevant and material. In *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982), the Court acknowledged its reliance on due process cases for the materiality requirement, cases involving "what might loosely be called the area of constitutionally guaranteed access to evidence." Under those decisions, defendants are constitutionally privileged to request and receive disclosure of evidence which is favorable to the defense

and relevant to guilt or punishment. *See, Brady v. Maryland*, 373 U.S. 83 (1963) and progeny.

The mere possibility that the undisclosed information might have assisted the preparation of a defense does not, however, establish materiality in the constitutional sense. *United States v. Agurs*, 427 U.S. 97, 109-110 (1976). The trial court's preliminary review of the records failed to disclose the medical records sought, and counsel's request for other information was rejected as lacking in the required specificity (HT 10-11, 15-16; JA 69a-70a, 71a-72a). Because of the obvious and diminished opportunity to establish materiality in cases like the present, a relaxation of the specificity required might be appropriate, but not its dispensation. *Valenzuela-Bernal*, 458 U.S. at 870.

Respondent's failure to describe events to which a potential witness *might* testify, or the relevance of the events to the crime—some factual description of the material evidence—cannot under the Compulsory Process Clause satisfy the preliminary showing what would have entitled him to pierce the confidentiality of the child protective service record. The request countenanced by the Supreme Court of Pennsylvania is a classic fishing expedition disapproved by this Court. *See United States v. Nixon*, 418 U.S. 683, 700 (1974).

C. The pretrial disclosure of confidential records threatens the compelling state interests of identifying, protecting and treating child victims of physical and sexual abuse and undermines the stated legislative purpose of encouraging more complete reporting of suspected abuse. The preeminence of the reporting function is recognition of the fact that frequently only a "third person—a friend, a neighbor, a relative, or a professional—recognizes the child's danger and reports

it. . . ." Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 Vill.L.Rev. 458, 464 (1978).

The Pennsylvania Child Protective Service Law contains elaborate procedural mechanisms to implement the state's interest, and the confidentiality provision of the law is designed to protect that interest. Although amendments to the law which postdate the present litigation ostensibly provide law enforcement officials additional opportunities to request and receive child protective service records, they do not provide *carte blanche* access to sensitive, confidential files.

The Pennsylvania Court's *per se* rule granting the accused the absolute privilege to demand disclosure of confidential records is a needlessly drastic remedy. The order will permit disclosure of information which has been divulged on the strength of representations of its confidentiality. The potential impact on the privacy interests of the victim, her family, and individuals who cooperated in the agency investigation is incalculable. Moreover, the order is offensive to the traditional role of the trial court, denigrates its authority, and directly conflicts with *United States v. Nixon*, 418 U.S. at 714. The Pennsylvania Court's order ignored the less drastic alternative of permitting the trial court to make a preliminary determination of the materiality and sealing the record for subsequent appellate review. *In re Robert H.*, 199 Conn. 693, 509 A.2d 475 (1986).

ARGUMENT

I. The Supreme Court of Pennsylvania has misconstrued the application and scope of the Confrontation and Compulsory Process Clauses of the Sixth Amendment.

A. Pretrial denial of defense access to statutorily privileged records does not implicate the Confrontation Clause absent a subsequent limitation on the scope of cross-examination of prosecution witnesses at trial.

In view of the fact that the Supreme Court of Pennsylvania relied on *Davis v. Alaska* for its conclusion that respondent's right of confrontation required the disclosure of confidential child protective service records, a preliminary examination of the Court's analysis is in order. The Court recognized the "concern [expressed in *Davis*] that the effect of the state's confidentiality provision may have been to allow the testifying witness to give a questionably truthful answer, and to prohibit the defendant from testing the truth of the testimony through the process of cross-examination." *Commonwealth v. Ritchie*, 502 A.2d at 152 (Pet. for Cert. 10a). Of course, the confrontation violation in *Davis* arose from the limitation placed on defense counsel's right to inquire *at trial* into the prosecution witness' juvenile probationary status, his protestation of unconcern that he might have been a suspect in the burglary, and his denial of previous police exposure. *Davis v. Alaska*, 415 U.S. at 313-14.

In applying *Davis* to the present case, the Supreme Court of Pennsylvania found "that the Commonwealth's interest in maintaining the confidentiality of these records may not override a defendant's right to effectively confront and cross-examine the witnesses against him." *Ritchie*, 502 A.2d at 153 (Pet. for Cert.

12a). The Court's discussion, in the Commonwealth's view, is premised on the assumption that the constitutional error in *Davis* arose from the trial court's grant of a protective order to prevent reference to the witness' juvenile record. The *Ritchie* court reasoned, apparently, that respondent's confrontation privilege was abridged by the trial court's refusal to permit defense counsel's pretrial access to the child protective service records, thus denying him the opportunity to review the records "with the eyes and perspective of an advocate." *Ibid.*

In *Davis*, as in the present case, the confrontation issue arose pretrial, but there the analogy ceases. The witness' juvenile probationary status became a concern in the course of the *voir dire* of prospective jurors. At this stage of the proceeding the prosecutor sought a protective order to preclude further discussion of the witness' prior juvenile adjudication. (Brief for Petitioner at 8, *Davis v. Alaska*). This Court, however, faulted the trial court in *Davis* for the limitation imposed *at trial* where defense counsel was prevented from effectively "pursuing a relevant line of inquiry." *Davis v. Alaska*, 415 U.S. at 312-14. In contrast, defense counsel in the present case was not limited on cross-examination by the hearing court's pretrial order. No subsequent restrictions on any relevant line of inquiry were imposed. Moreover, defense counsel did not renew his request at trial for disclosure of the disputed records.

"The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for a jury to weigh the demeanor of the witness." *Barber v. Page*, 390 U.S. at 725. *Cf. McCray v. Illinois*, 386 U.S. at 311 (compulsory disclosure of informer's identity has never been required where issue

is preliminary one of probable cause and guilt or innocence is not at stake); *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934), (defendant's exclusion from mid-trial "viewing" held not violative of Confrontation Clause). *See also, United States v. Pepe*, 747 F.2d 632 (11th Cir. 1984), ("no court of appeals ha[s] extended the sixth amendment right of confrontation to an evidentiary suppression hearing").

Only last term, this Court explained that its confrontation decisions reflected two areas of concern: a longstanding solicitude for the accused's literal right to confront adverse witnesses at trial and its reluctance to approve limitations on a defendant's right to expose the factfinder, through cross-examination, to facts from which unfavorable inferences might be drawn regarding the prosecution witness' trial testimony. *Delaware v. Fensterer*, 106 S.Ct. at 294.

This Court concluded that Fensterer's Confrontation Clause claim concerning the inability of the prosecution's expert witness to recall the basis for his in-court testimony—and its resulting frustration of counsel's attempts to test the witness' theory through cross-examination—fell into neither category. The prosecution proffered no hearsay evidence, and there was no restriction on the scope of cross-examination. *Id.*, 106 S.Ct. at 294-95. This Court further observed that "[g]enerally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective. . . ." *Id.*, 106 S.Ct. at 295 (emphasis in the original).

Similarly, the present case appears to be a categorical orphan, falling within no orthodox understanding of the Court's Confrontation Clause decisions. The prosecutor made no contested attempt at trial to employ hearsay,

and the trial judge placed no impediment upon the breadth of trial counsel's cross-examination of prosecution witnesses. The Commonwealth submits, consequently, that the Supreme Court of Pennsylvania's analysis of the Sixth Amendment's "counter" of the right of confrontation was clearly erroneous, manifesting a superficial understanding of this Court's relevant Confrontation Clause decisions, and was prematurely applied in the context of a *pretrial* order restricting respondent's *pretrial* access to presumptively confidential material.[8] Accordingly, the Commonwealth respectfully urges this Court to reject the Supreme Court of Pennsylvania's analysis of the applicability of the Confrontation Clause.

B. Respondent made no preliminary demonstration that the CYS records were relevant, material, or otherwise necessary to his defense, hence the Supreme Court of Pennsylvania's conclusion that their pretrial disclosure was constitutionally compelled is clearly erroneous.

This Court has suggested that its decision in *Washington v. Texas, supra*, contained intimations that a violation of the constitutional right to compulsory process could not be established in the absence of a preliminary showing that the testimony sought was relevant and material. *United States v. Valenzuela-Bernal*, 458 U.S. at 867. Acknowledging, however, that the pedigree for the requirement of materiality appears in decisions involving "what might loosely be called the area of constitutionally guaranteed access to evidence,"

[8] It is apparent, however, from the remand order directing the trial court to grant respondent access to the files in order to argue what use could have been made of the material "in presenting other evidence," *Ritchie*, 502 A.2d at 153-54, that the Supreme Court of Pennsylvania considered, alternatively, the application of the Compulsory Process Clause. The Commonwealth addresses that aspect of the case *post*.

ibid., this Court canvassed and discussed decisions specifically relying on the Due Process Clause of the Fifth Amendment.

Defendants are constitutionally privileged to request disclosure by the prosecution of evidence which is favorable to the accused and relevant to the guilt or punishment phase of a criminal prosecution. *Brady v. Maryland, supra; Moore v. Illinois*, 408 U.S. 786 (1972); *United States v. Agurs, supra.* However, "[t]he mere possibility that an item of undisclosed information might have helped the defense[.] .. does not establish 'materiality' in the constitutional sense." *Id.*, 427 U.S. at 109-110. The federal appellate courts show no inclination to permit defendant's to rummage through state or federal governmental files on the bare contention that otherwise confidential material *might* have been useful in preparing a defense. *See, e.g., United States v. Gel Spice Co.*, 773 F.2d 427 (2d Cir. 1985), *cert. denied*, _____ U.S. _____, _____ Cr.L. _____ (1986) (internal Food and Drug Agency documents); *United States v. Krauth*, 769 F.2d 473 (8th Cir. 1983) (United States Postal Service "mail cover" records); and *Camitsch v. Risley*, 705 F.2d 351 (9th Cir. 1983) (state juvenile case files).

Respondent's preliminary showing of materiality, such as it was, consisted of the following representations by his trial counsel:

> There is possible witnesses available out of these reports. [sic]
>
> * * *
>
> There is a medical report in that file that I know about.
>
> * * *

> The girl was examined by a doctor in September, 1978. I'd like to see the doctor's report.
>
> * * *
>
> That physical examination was taken on behalf of Child Welfare Services. All I know is that [CWS] received a complaint someone was mistreating this girl. They went down and interviewed this girl . . . and they asked the father . . . They gave the father a report [form?] to take her to a doctor and have the doctor examine this girl.
>
> * * *
>
> The other thing is this. Whether or not their records would disclose witnesses that are not known to this defendant [sic].
>
> * * *
>
> There could be defense witnesses disclosed by their records here. There could be matters in there that could be favorable to the defendant.

(HT 4-7, 10; JA 65a-67a, 69a).

The trial court, relying in part on representations by CYS representatives and in part on its personal review of the materials surrendered, concluded that the medical records sought were not in the agency's possession. Moreover, because respondent's counsel had not made "specific allegations that [could] be verified or determined[,]" he was not permitted to review the agency files for additional material (HT 10-11, 15-16; JA 69a-70a, 71a-72a). It is starkly evident that respondent's expectations of discovering "possible" witnesses "favorable to the defendant" in the CYS files were accompanied by not the scantest representation regarding either the identity of potential witnesses or even what aspect of the case they might be testimonially competent to describe.

The Commonwealth notes additionally that the materiality of the report of the September 1978 medical examination is not apparent. Its potential as an impeachment tool, it seems, would be manifested by the victim's failure to report sexual abuse by her father when she had the opportunity to be heard by a presumably sympathetic audience. However, the victim testified that she did not inform either the caseworker or the examining physician that she was being sexually victimized (NT 125-126; JA 60a-61a). The jury, of course, was free to consider her omission. With respect to the use of the medical examination as a discovery tool, the Commonwealth submits that respondent surely was in a favorable position to identify the CWS caseworker who examined the victim and her brothers in their home (NT 92, 244-45; JA 48a). Moreover, respondent knew the identity of the examining physician (HT 6; NT 107; JA 66a; 49a), and he knew or could have discovered the identity of the police officers who received and processed the formal complaint of sexual abuse in June 1979 (NT 52-53, 245; JA 25a-26a). Finally, respondent's own trial testimony contained an insinuation that the child abuse report which led to CYS' examination of the child was triggered because, he said, his daughter was reportedly "messing around" with a young, unidentified male (NT 246).

Respondent could have, the Commonwealth contends, asked the trial court to review the CYS files for statements or other references by any of these potential witnesses, and, based on the issues to be determined at trial, he could have made some plausible effort to establish the constitutional materiality of the requested information. Manifestly no such preliminary showing was made, and, consequently, the trial court simply had no adequate basis upon what to exercise its discretion.

A particularly vexing problem concerning materiality arises in the context of cases like the present. Here, as in the informer cases or in the deported alien cases, see *Roviaro v. United States,* 353 U.S. 53 (1957); *McCray v. Illinois* and *United States v. Valenzuela-Bernal, supra,* respondent had no way realistically to determine the actual contents of the CYS records. This Court, however, suggested in *Valenzuela-Bernal* that the diminished opportunity to establish materiality in such cases "may well support a relaxation of the specificity required . . . [but] we do not think that it affords the basis for wholly dispensing with such a showing." *Id.,* 458 U.S. at 870. The effect of the Court's ruling in *Commonwealth v. Ritchie, supra,* is, nevertheless, to dispense with such a showing.

This Court has suggested a formulation which provides adequate guidance to defense counsel on the presentation of a plausible demonstration of materiality regarding potentially discoverable matter to which criminal defendants, as in the informer cases, otherwise have no ready access.

> In such circumstances, it is of course not possible to make any avowal of *how* a witness may testify. But the events to which a witness might testify, and the relevance of those events to the crime charged, may well demonstrate either the presence or absence of the required materiality.[9]

United States v. Valenzuela-Bernal, 458 U.S. at 871 (emphasis in the original). Thus, the defendant in such a situation "necessarily proffers a *description* of the material evidence rather than the evidence itself." *Id.* at 874 (emphasis supplied).

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[9] *Cf.,* P. Westen, *Compulsory Process II,* 74 Mich.L.Rev. 191, 274-75 (1974) (sufficient to relate that potential witness was present at scene of crime, participated in crime, or was an accomplice of defendant; but there must be *some* factual basis for the request).

Even under this undemanding standard, respondent's speculative claim of need did not meet the preliminary showing of materiality necessary to entitle him to invoke the Compulsory Process Clause. In venturing to interpret the United States Constitution to dispense with this demonstration, the Supreme Court of Pennsylvania Court has not only erred, but it appears to have countenanced the classic "fishing expedition" disapproved in this Court's prior disclosure cases. *See United States v. Nixon*, 418 U.S. 683, 700 (1974); *Jencks v. United States*, 353 U.S. 657, 667 (1967); *cf., United States v. Weiner*, 578 F.2d 757 (9th Cir. 1978) (request for "anything exculpatory" is equivalent to no request at all, and trial judge need not accord the slightest heed to such a shotgun approach); *McKenney v. Wainwright*, 488 F.2d 28, 30 (5th Cir. 1974) *cert. denied*, 416 U.S. 973 (1974) (denial of request for continuance to discover "witnesses who could aid in the defense of the case" not violation of Compulsory Process Clause).

Under these facts, respondent has failed to establish a violation of the Compulsory Process Clause of the Sixth Amendment. The decision below to the contrary is a clearly erroneous interpretation by a state court of established federal constitutional principles.

C. The pretrial disclosure ordered by the Supreme Court of Pennsylvania threatens the primary mechanism by which the Commonwealth identifies, protects, and treats the child victim of physical and sexual abuse; the disclosure order undermines the stated legislative policy of encouraging more complete reporting of suspected abuse.

Although the Supreme Court of Pennsylvania is technically correct in declaring that the Child Protective Services Law[10] (CPSL) "was enacted to identify and

[10] Act 1975, November 26, P.L. 438, No. 124 §§1-24, *as amended* (11 P.S. §2201 *et seq.*, Purdon, Supp. 1986).

protect children suffering from abuse and to provide rehabilitation services to such children and their families[,]" *Commonwealth v. Ritchie*, 502 A.2d at 151 (Pet. for Cert. 6a), the Court seemingly has ignored what the Commonwealth and others believe to be the *sine qua non* of the legislative purpose, increased reporting of suspected children abuse.

> It is the purpose of this Act to encourage more complete reporting of suspected child abuse and to establish in each county a child protective service capable of investigating such reports swiftly and competently, providing protection for children from further abuse and providing rehabilitation services for children and parents involved so as to ensure the child's well being and to preserve and stabilize family life wherever appropriate.

11 P.S. §2202. The preeminence of reporting, and its legislative encouragement, is due largely to the fact that

> Protection for [victims of child abuse] is often possible only when a third person—a friend, a neighbor, a relative, or a professional—recognizes the child's danger and reports it to the proper authorities. Reporting begins the child protective process.[11]

The sketchy legislative history of the CPSL suggests that it was the Pennsylvania Legislature's intention originally to endorse a therapeutic approach to the pathology of child abuse.[12] Indeed, the purpose clause of the CPSL evidences that intent. In support of that purpose, the statute marshalls the resources of persons who, in the course of their employment, practice or

[11] Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 Vill.L.Rev. 458, 464 (1978).

[12] *See, e.g.*, PA. SENATE JOURNAL at 926 (November 18, 1975).

profession, are obligated to report incidents of suspected abuse 11 P.S. §2204(c). In addition, "any person may make such a report . . [,]" *id.*, §2205: those persons doing so in good faith are guaranteed civil and criminal immunity, *id.*, §2211; reporting procedures are detailed, *id.*, §2206; certain privileged communications are abrogated to the narrow extent that they would impede the reporting function, *id.*, §2204(c); and, most importantly, the CPSL provides a qualified confidentiality for reports made pursuant to the law, *id.*, §2215.

It must be supposed that the limited confidentiality extended to such matter was based on the legislature's considered policy of encouraging those most close to suspected incidents of, for example, intra-familial sexual abuse to step forward, despite the potential risks, so that both the protective and rehabilitative functions of the CPSL could be engaged.

The legislature, in restricting access to CPSL reports, excepted the following: child protective service workers, treating physicians or hospital authorities, *guardians ad litem*, State Department of Public Welfare (DPW) officials, and courts of competent jurisdiction. *Id.* §2215(a)(1) through (5). In amendments which post-dated respondent's trial, the legislature expanded the number of persons, agencies, or other organizations to whom reports of suspected abuse could be referred.[13]

Law enforcement officials, *inter alia*, were now included among those persons or agencies granted conditional access to reports of suspected abuse made pursuant to CPSL.[14] By regulation, DPW has defined law

[13] Act 1982, June 10, P.L. 460, No. 163 §15(a)(6) through (11), (11 P.S. §2215(a)(6) through (11), Purdon, Supp. 1986).

[14] 11 P.S. §2215(a)(9), (10).

enforcement official to include a county district attorney.[15] Information referrals made to law enforcement officials are subject to the following conditions:

> (1) Referrals shall be made by the CPS to the District Attorney or other appropriate law enforcement official on forms provided by the Department.
>
> (2) Referrals shall be made if the initial review by the CPS gives evidence that the alleged abuse perpetrated by persons whether or not related to the child is one of the following:
>
> (i) Homicide.
>
> (ii) Sexual Abuse or exploitation.
>
> (iii) Serious bodily injury.
>
> (3) Referrals shall be made if the initial review by the CPS gives evidence that the alleged abuse is child abuse perpetrated by persons who are not family members.
>
> (4) If during the course of investigating a report of suspected child abuse, the CPS obtains evidence which indicates that referral to law enforcement officials is appropriate, the CPS shall immediately refer the report to the law enforcement official.
>
> (5) The CPS shall not refer to law enforcement officials reports of suspected child abuse which do not meet the requirements of paragraphs (2) and (3).
>
> (c) The CPS shall not provide information to a law enforcement official under this section, unless the law enforcement official has exhibited proper identification to the CPS.[16]

[15] 55 Pa. Code 3490.4, *published at* 15 Pa. B. 4554 (December 21, 1985).

[16] *Id.*, §3490.92.

Moreover, the following precautions are mandated:

> (a) The release, of data that would identify the person who made a report of suspected child abuse or person who cooperated in a subsequent investigation is prohibited, unless the Secretary finds that the release will not be detrimental to the safety of the person.
>
> (b) Prior to releasing information under subsection (a), the Secretary will notify the person whose identity would be released that he has 45 days to advise the Secretary why this anticipated release would be detrimental to his safety.[17]

The motivation for the 1982 amendments undoubtedly reflects a heightened sensitivity on the part of the state legislature to the frightening scope of child sexual abuse. The enactment of the amendments clearly signaled that the Pennsylvania General Assembly had modified its primary goal of therapeutic intervention to include a companion focus: recognition that family violence in general and child sexual abuse in particular were crimes, and that law enforcement intervention was appropriate.[18]

The Supreme Court of Pennsylvania, although ostensibly relying on the pre-amendment version of the CPSL, obviously was preoccupied with the access to child protective service records which it supposed the prosecution was now permitted under the 1982 amendments. *Commonwealth v. Ritchie*, 502 A.2d at 153, n.15 (Pet. for Cert. 11a). In view of that preoccupation, and in anticipation that respondent will contend that the 1982 amendments have reduced child protective service agencies to mere repositories of criminal information,

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[17] *Id.*, §3490.94; *see also* 11 P.S. §2215(c).

[18] PA. HOUSE JOURNAL at 1162 (May 5, 1982).

thus offering law enforcement officials *carte blanche* to confidential records, the Commonwealth considered itself obliged to review the pertinent amendments and implementing regulations.

It is our position that the amendments have not altered the policy underlying the purpose clause of the CPSL, the encouragement of more complete reporting of suspected child abuse. The confidentiality provision, when read in conjunction with the DPW regulations, evidences a measured and deliberate response to the varied, yet not incompatible, compelling state interests of protecting the child victim, shielding the privacy of the family, friends, or neighbors of a victim of child abuse, and the prosecution of serious child abuse, physical and sexual. The confidentiality provisions of CPSL protect those interests in a rational fashion, and the Commonwealth contends that the Sixth Amendment privileges of confrontation and compulsory process do not, under the facts of this case, require the heedless intrusion sanctioned by the Supreme Court of Pennsylvania.

The Pennsylvania Court's *per se* rule, that any defendant prosecuted for any offense involving the abuse of children has an absolute right to investigate CWS files in preparation for trial, is a needlessly drastic remedy. Unrestricted access, not just for prior statements of a victim or a witness, but for discovery of any information, whether material or not, exculpatory or not, gathered or developed in the course of the agency's investigation of the child, would permit counsel to uncover the necessarily raw, social service data gathered by child protective service caseworkers. Information, for example, regarding unrelated psychiatric or other counseling summaries concerning both family members and the

victim would become known. Of even graver concern to the Commonwealth, especially in cases involving the secret, shameful world of intra-familial sexual abuse, the identities of family members, friends, or neighbors who consented to be interviewed or who cooperated with the child protective service agency, as well as the identity of the individual whose report triggered agency intervention would be revealed. This so, whether or not the Commonwealth knew of, possessed, or employed such witnesses in a subsequent criminal prosecution. In the Commonwealth's view, a reporting system which is compromised to the extent urged by respondent and countenanced as constitutionally compelled by the Pennsylvania Court is seriously and dangerously flawed.

Such intrusions, we contend, will seriously hamper law enforcement in this unique and sensitive area. It is unrealistic to expect that the statutory anonymity of a person reporting his suspicions will be long preserved after it has been disclosed to counsel for a defendant. Notwithstanding the Pennsylvania Court's exhortation regarding the dissemination of confidential materials discovered in the wake of counsel's review, *Commonwealth v. Ritchie*, 502 A.2d at 153, N.16 (Pet. for Cert. 12a), the Commonwealth is not sanguine that witnesses will step forward freely when it becomes apparent that counsel for an accused will be granted unlimited access to the entire file maintained by the child protective service agency.

Although the precise issue before the Court is novel, several of its prior decisions suggest, we think analogously, that the disclosure order granting defense access to a presumptively confidential child protective service record is not compelled by the commands of the Sixth Amendment. Even assuming for the sake of

argument that the Commonwealth could routinely gain access to the confidential files of CWS, directly or indirectly, as the Supreme Court of Pennsylvania has presumed, *Commonwealth v. Ritchie*, 502 A.2d at 153, n.15, and further assuming, as respondent contended below, that the CWS records were in the effective possession or control of the prosecution (Brief for Appellee at 12-13, *Commonwealth v. Ritchie*), respondent would still not be entitled to disclosure of the prosecution's entire file.

> Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial[.]

United States v. Bagley, _____ U.S. _____, 105 S.Ct. 3375, 3380 (1985) (relying on *United States v. Agurs*, 427 U.S. at 106). Although this Court has apparently reserved for later decision the question of the impact on traditional testimonial privileges of a defendant's right to compulsory process, the court expressly has declined to disapprove such privileges. *Washington v. Texas*, 388 U.S. at 23, N.21. The Court has instructed moreover, that the vaunted "right to every man's evidence" is always subject to exceptions embodied in constitutional, common-law, or statutory privileges. *United States v. Nixon*, 418 U.S. at 709. A reporter's identity in the child protective service scheme should therefore be as zealously guarded as the police informant's identity, protected by a state evidentiary privilege, in *McCray v. Illinois*, 386 U.S. at 313-14. *Cf., Cooper v. California*, 386 U.S. 58, 62, n.2 (1967) (prosecutor's failure to produce its informant to testify at trial, and thus to render him available for defendant's cross-examination, was not violative of the Confrontation Clause). Finally, it is

apparent that this Court, when privilege or confidentiality is asserted, considers indispensible an *in camera* procedure in view of the importance of "scrupulous[ly] protect[ing] against any release . . . of material not found by the court . . . properly admissible and relevant to the issues. . . ." *United States v. Nixon*, 418 U.S. at 714.

The *Ritchie* Court's remand order directing the trial court to review the records *in camera* and then to surrender the entire file to defense counsel so that he can second-guess the trial court's exercise of discretion usurps and degrades the traditional role of the court in evaluating the validity of such claims and in supervising the orderly admission and presentation of evidence in a criminal proceeding. Under such circumstances, the trial judge's role in "taking appropriate steps to insure against improper dissemination of sensitive material" is wholly and redundantly ceremonial. For what conceivable purpose would the trial court review the confidential records *in camera* if it were not to exercise its discretion in determining what relevant, material and exculpatory evidence should be surrendered to the respondent? There can be no doubt that the empty formality ordered by the Pennsylvania Court does not contemplate such an exercise.

The unseemly denigration of the trial court's role in evaluating the limited claim of privilege in the present case stands in stark relief to this Court's understanding generally of a trial court's responsibilities when faced with a claim of privilege. In *United States v. Nixon*, *supra*, the Court instructed:

> It is elementary that *in camera* inspection of evidence is always a procedure calling for scrupulous protection against any release or publication of

> material not found by the court at that stage, probably admissible in evidence and relevant to the issues of the trial for which it is sought.

Id., 418 U.S. at 714. The Court also made it abundantly clear that it was within the discretion of the trial court to seek the aid, if necessary, of the contending parties for *in camera* consideration of potentially troublesome excisions, "whether the basis for the incision is relevancy or admissibility." *Id.* 418 U.S. at 715, n.21.

Although evaluating Sixth Amendment claims in the context of statutory privileges between sexual assault counselors and victims and psychologist-client relationships respectively, the Connecticut and Colorado Supreme Courts have recently announced decisions which the Commonwealth commends to this Court for their diversity of approach.

In *In re Robert H.*, *supra*, the Court elaborated an *in camera* procedure designed to protect both the confidentiality of the victim's communications with her sexual assault counselor and the accused's rights of confrontation, compulsory process, and due process. It is notable that the *in camera* procedure employed was not activated until the prosecution witness' direct testimony had been received.

> The trial court's in camera review of the victim's records, if she consents, shall not be limited to merely "relevant material." The trial court's in camera review of the sexual assault counselor's records should determine if there are any inconsistent and relevant statements of the victim in the records *when compared to the victim's direct examination.*

(Emphasis supplied).

* * *

> Relevant, inconsistent statements are only those statements which are verbatim accounts by the victim given to the counselor and which are directly related to an essential element of the crime for which the respondent is standing trial. Inconsistent, as it is used above, does not refer to a lack of *complete* uniformity in details as compared to trial testimony.

(Emphasis in the original).

* * *

> If the trial court denies or limits the disclosure of the contents of the records after following the above procedure, then the undisclosed material that is the subject of the respondents' request should be sealed for possible review on appeal.

Id., 509 A.2d at 484-85. *See also, State v. Storlazzi*, 191 Conn. 453, 464 A.2d 829 (1983).

In *People v. District Court*, _____ Colo. _____, 719 P.2d 722 (1986), on the other hand, the Court concluded that the trial judge erred in ordering pretrial production of records of therapy sessions involving the victim of sexual assault for its *in camera* review on the strength of the accused's Confrontation Clause claim. *Id.*, 719 P.2d at 724. The Court ultimately determined that the defendant's proffer "failed to make any particularized factual showing in support of his assertion that access to the privileged communications of the victim is necessary for the effective exercise of his right of confrontation." *Id.*, 719 P.2d at 727. It is noteworthy, too, that the Colorado Court firmly rejected the notion of a "balancing test" in the context of what it considered to be the absolute privilege existing between therapist and victim. *Ibid.*[19]

[19] The Commonwealth has not urged an absolute privilege regarding the confidential records at issue here.

In the preceding cases, the state courts relied on both the federal and their own state constitutions in analyzing the Sixth Amendment claims. In both cases the courts eschewed the position taken by the Supreme Court of Pennsylvania that in balancing "the types of protection that can be afforded a victim and one accused[,]" the scales must always tip in favor of the accused's privileges of confrontation and compulsory process. *Commonwealth v. Ritchie*, 502 A.2d 151 (Pet. for Cert. 8a). Manifestly the Pennsylvania Court's remand order fails to balance the competing interests of protecting the child victim during the pendency of the criminal proceedings, encouraging reports of suspected child sexual abuse, shielding the privacy of the victim and her family and guaranteeing the accused his constitutional right to present a defense.

The remand order directing disclosure of presumptively confidential files rests on erroneous interpretations of this Court's relevant confrontation, compulsory process, and due process decisions. And to the extent that the judgment below imposes—as a matter of federal constitutional law—greater restrictions on a compelling state interest than this court has been inclined to do, the order is similarly flawed. *Cf., Fare v. Michael C.*, 442 U.S. 707 (1979).

Conclusion

The Court is urged to rule that the Confrontation Clause does not compel the pretrial disclosure of unexpurgated, presumptively confidential child protective service records merely to permit a criminal defendant's lawyer to argue how the records might be used to cross-examining witnesses at trial "or in presenting other evidence." Similarly, the Court should rule that the accused may not invoke the privilege guaranteed by the Compulsory Process Clause for the purpose of breaching the confidentiality of such records, either before or during trial, on the strength of a speculative representation that the records might contain discoverable matter of potential use in preparing his defense. Further, the Court should rule that Pennsylvania's interest in identifying, protecting, and rehabilitating child victims of physical and sexual abuse stands in equal dignity with federal constitutional provisions which protect a criminal defendant's right to present a defense. Consequently, the Court should expressly reject the Supreme Court of Pennsylvania's conclusion that the Sixth Amendment's "counters" of confrontation and compulsory process invariably must be weighted against competing concerns, however compelling.

Finally, the Court should reaffirm the traditional prerogative of the judiciary to make preliminary, *in camera* determinations concerning disclosure of privileged matter and reject the Supreme Court of Pennsylvania's novel procedure of permitting defense counsel to undertake the initial review of the propriety of the trial court's exercise of discretion.

Accordingly, this Court should reverse the judgment of the Supreme Court of Pennsylvania and remand the case for further proceedings not inconsistent with its opinion.

Respectfully submitted,

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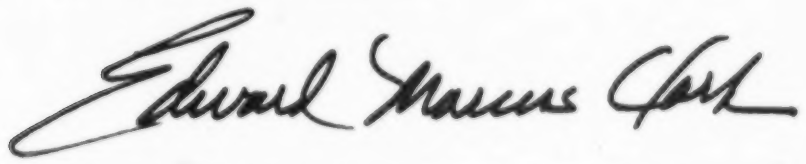

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No. 85-1347

IN THE

Supreme Court of the United States

October Term, 1985

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Petitioner,

vs.

GEORGE F. RITCHIE,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

REPLY BRIEF FOR PETITIONER

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ARGUMENT

The judgment and order of the Supreme Court of Pennsylvania is, for purposes of 28 U.S.C. §1257(3), a final judgment, conferring jurisdiction on this Court to review the claim of constitutional error presented by your petitioner.

The Supreme Court of Pennsylvania has effectively invalidated the confidentiality provisions of the state Child Protective Services Law,[1] relying exclusively on its

[1] Act 1975, November 26, P.L. 438, No. 124, §15; 11 P.S. §2215 (Purdon).

interpretation of the scope of the privileges afforded a state criminal defendant by the Confrontation and Compulsory Process Clauses of the Sixth Amendment. *Commonwealth v. Ritchie*, _____ Pa. _____, 502 A.2d 148 (1985); (Pet. for Cert. App. A). In vacating respondent's judgment of sentence, the Court concluded that the trial court's refusal to grant respondent pretrial access to presumptively confidential child protective services files concerning the child-victim and her family impermissibly fettered respondent's ability to defend himself.

> When materials gathered become an arrow of inculpation, the person inculpated has a fundamental constitutional right to examine the provenance of the arrow and he who aims it. Otherwise, the Sixth Amendment can be diluted to mean that one may face his accusers or the substance of the accusation, except when one is shielded by legislative enactment.

Id., 502 A.2d at 153; (Pet. for Cert. 11a).

The Supreme Court of Pennsylvania ordered an evidentiary hearing. The trial court has been directed to permit defense counsel to review, without restriction, the entire child protective service file for the purpose of arguing "to the trial court what use, if any, could have been made of the files in cross-examining the complainant or in presenting other evidence." *Id.*, 502 A.2d at 153-54; (Pet. for Cert. 12a-13a). The Commonwealth may then attempt to establish, if indeed arguably material and relevant matter is disclosed, that the asserted error was constitutionally harmless. *Id.*, 502 A.2d at 154; (Pet. for Cert. 13a). "Unless the trial court is convinced that any error was necessarily harmless, it shall vacate the judgment of sentence and grant [respondent] a new trial." *Ibid.*

A. The Sixth Amendment issue has been finally determined by the highest court of Pennsylvania; there is sufficient justification for immediate review by this Court of the substantial federal question presented.

Respondent does not dispute that the highest court of Pennsylvania has finally determined the federal constitutional issue present in this case, and, of course, the issue is not susceptible of further review in the courts of the Commonwealth. Respondent argues, nevertheless, that the decision is not a final judgment—as that term is understood in Title 28 U.S.C. §1257—because there are further state proceedings to come. Hence, the judgment below is interlocutory (Brief for Respondent 6).

Respondent acknowledges, however, that this Court has "amplified" its orthodox definition of finality[2] over the past 100 years and, in certain cases, has exercised its jurisdiction even where further proceedings in the lower state courts are contemplated. *Id.* at 8. This Court has explained that in certain categories of such cases review has been undertaken despite the apparent jurisdictional barrier.

> In most, if not all, of these cases . . . additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice[.] . . .'

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477-78 (1975) (footnote omitted), *quoting Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945). However, respondent contends that the present case fits within none of the four exceptions discussed in *Cox Broadcasting Corp.*, 420

[2] Citing *Mower v. Fletcher*, 114 U.S. 127 (1885).

U.S. at 479-483. Specifically, he argues that this Court is without authority to review the judgment below before the evidentiary hearing has concluded because, he speculates, the trial court's harmless error determination could raise additional federal issues or render the issue moot. Respondent reasons that the salutary policies served by avoiding piecemeal litigation would be undermined by this Court's premature assumption of jurisdiction (Brief for Respondent 7-8). In view of the nature of the state proceeding ordered by the Supreme Court of Pennsylvania, and considering that the federal constitutional issue, however decided, will necessarily control the disposition of the evidentiary hearing, respondent's argument, if accepted, would insure judicial inefficiency and piecemeal litigation.

B. Postponement of review would serve none of the policy considerations militating against interlocutory appeals; the very nature of the confidentiality claim demands pre-hearing review to avoid irreparable injury.

The Commonwealth submits that the present controversy is precisely the kind of case in which finality ought to be given a "practical rather than a technical construction." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). The unique facts of this case provide, in the Commonwealth's view, sufficient justification for immediate review. 1) The scope and application of the Confrontation and Compulsory Process Clauses have been authoritatively construed by the Supreme Court of Pennsylvania, incorrectly in the Commonwealth's view. 2) The Sixth Amendment issues, had they been decided the other way, would have been determinative of the only aspect of the decision below which has been contested by the Commonwealth. 3) The mere convening of the state evidentiary hearing, under

the conditions imposed by the state Supreme Court, requires *ab initio* complete disclosure to respondent's counsel of the contents of the confidential file, an irretrievable loss in terms of the interests asserted by the Commonwealth. 4) There is literally nothing left to be decided, and interlocutory review would permit this Court to correct what the Commonwealth believes to be a highly prejudicial legal error. The very nature of the confidentiality claim, as Pennsylvania and *amici* have argued in briefs on the merits, demands immediate protection. *See*, Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 Harv. L.Rev. 1004, 1007-08 (1978); *Cf., Abney v. United States*, 431 U.S. 651, 662 (1977), (double jeopardy protection would be lost if petitioner's claim were not reviewable before subsequent exposure occurs); *Wardius v. Oregon*, 412 U.S. 470, 478 (1973), (even if petitioner prevailed state would still have benefit of non-reciprocal rights, the very harm which petitioner wishes to avoid by challenging the rule).

Respondent is disposed to concede that under *Cox Broadcasting Corp.*, the issue before this Court would be appropriate for interlocutory review were a new trial to be awarded after the evidentiary hearing (Brief for Respondent 9, 11, 13). Nonetheless, he urges that the Commonwealth must first capitulate on the very issue before the Court by opening the child protective service files for counsel's unrestricted review—an intrusion he characterizes blandly as "minor" (Brief for Respondent 12). Further, he demands that the Commonwealth run the highly probable risk that this controversy will be rendered academic should the trial court determine that necessity for a new trial has not been established. The Commonwealth can conceive of no concern which would be served by the respondent's insistence on such formalism.

C. Postponement of review because of the interlocutory nature of the judgment below will ultimately moot the question presented or render later review impossible.

Notions of federalism and comity do not support respondent's theory of finality because the federal constitutional issue has been fully litigated in an orderly fashion by the state trial court, an intermediate appellate court, and the Supreme Court of Pennsylvania. There are no adequate and independent state grounds for decision. The trial itself has not been interrupted. The record in this case is fully developed legally and factually, providing an ample basis for decision. Crucially, postponement of review until after the evidentiary hearing will inevitably result either in the mooting of a novel question that this Court has determined to be substantial or in an order for retrial, the outcome of which assuredly will render later review impossible. *Cf., New York v. Quarles*, _____ U.S. _____, 104 S.Ct. 2626 (1984); *South Dakota v. Neville*, 459 U.S. _____, 103 S.Ct. 916 (1983); *California v. Stewart*, 384 U.S. 436 (1966).

Respondent's expectation that the Commonwealth must traverse the perilous minefield of mootness to qualify its claim as final utterly ignores, it seems, the fact that *Quarles*, *Neville*, and *Stewart* reflect the disinclination of this Court to subordinate its discretion to that particular uncertainty. *See also, Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 481, (if petitioner ultimately prevails on the merits the federal issues will be mooted; if petitioner were to lose on the merits, governing state law would not permit the presentation of the federal claim for review). That disinclination applies, the Commonwealth submits, with special urgency where, as here, the Sixth

Amendment issue "is unsettled . . ., is likely to control the disposition of the [evidentiary hearing] . . ., and . . . immediate disposition of the controversy would save unnecessary proceedings and delay in the trial court." Dyk, *Supreme Court Review of Interlocutory State-Court Decisions: "The Twilight Zone of Finality,"* 19 Stanford L.Rev. 907, 939 (1967).

Respondent's belief that review must be postponed until after the trial court's harmless error determination, in addition to being oblivious to the core of the present controversy, fails to comprehend the possibility that the harmless error inquiry might be made unnecessary by this Court's adjudication of the constitutional issue. If, for example, this Court were persuaded by the Commonwealth's argument that respondent's preliminary demonstration of constitutional materiality was so deficient as to amount to no offer at all, the trial court will be free, it is supposed, to ignore the mandate of the Supreme Court of Pennsylvania and deny retrial in reliance on this Court's authoritative interpretation of the compulsory process issue. *See, United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982). The trial court, additionally, might be enlightened concerning the standard of materiality as it relates to the harmless error analysis. *See, e.g., United States v. Bagley*, _____ U.S. _____, 105 S.Ct. 3375 (1985). Respondent's insistence that the parties proceed to the evidentiary hearing without the benefit of review of this claim will hinder rather than help the trial court's consideration of a potentially complimentary federal issue, serving no apparent interest of judicial efficiency or economy.

Finally, the Commonwealth is moved to comment on respondent's assertion that the Commonwealth must risk contempt by refusing to surrender the child protective service files in order to demonstrate its "seriousness" in this litigation (Brief for Respondent 15). The insinuation, in addition to being offensive, ignores two crucial points. 1) The Commonwealth, through the Office of the District Attorney, has never been custodian of the records. 2) The Commonwealth is not, as was the litigant in *Ryan v. United States*, 402 U.S. 530 (1971), resisting the production of records *per se*. The Commonwealth agrees that, if a preliminary demonstration of materiality and relevance had been advanced, certain material in the records could well be discoverable. The Commonwealth merely quarrels over who shall be custodian and who shall be the judge of materiality and relevancy.

The Commonwealth recognizes the dual responsibilities it has undertaken in the present case, and it relies on the integrity and persuasiveness of its legal argument—not on polemical observations regarding the adversarial positions of parties to the criminal justice process—to establish that the roles are not incompatible.

Conclusion

The Court is urged to reject respondent's contention that the question presented is not final within the meaning of 28 U.S.C. §1257. For the reasons previously stated in Pennsylvania's Brief on the Merits, the judgment of the Supreme Court of Pennsylvania should be reversed.

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On Writ of Certiorari to the
Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF

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EDITOR'S NOTE

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No. 85-1237

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

GEORGE F. RITCHIE,

Respondent.

On Writ of Certiorari to the
Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF

The Appellate Committee of the District Attorneys Association of California hereby respectfully moves for leave to file the attached brief of amicus curiae in this case. The consent of the

attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The Appellate Committee of the California District Attorneys Association is a committee created by the district attorneys of California to utilize and coordinate the resources of district attorneys' offices throughout the state, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have a major statewide impact upon the prosecution of criminal offenses. Upon review of the instant matter, the Committee has concluded that the outcome of this case will have a substantial impact upon the administration of criminal justice throughout California should this Court hold that a defendant has a constitutional right of access to the presumptively

confidential records of a public agency pertaining to the alleged victim of sexual offenses. Accordingly, the Committee has decided to seek permission to file an amicus curiae brief herein. The Office of the District Attorney of the County of Los Angeles has been requested to prepare and submit this brief. The District Attorney of the County of Los Angeles is an authorized law officer of the county, which is a political subdivision of the State of California. (See Rule 36.4.)

In the instant case the Supreme Court of Pennsylvania has held that the Sixth Amendment right of confrontation includes the right of a defendant to have access to the presumptively confidential records of a public agency pertaining to the child-victim. That court overlooked United States v. Bagley, 105 S.Ct. 3375

(1985), a case which is inconsistent with the holding of the Pennsylvania court. Moreover, that court has not considered this Court's approval of the Jencks Act (18 U.S.C. §3500) as constitutionally valid, a point also inconsistent with the Pennsylvania Supreme Court's conclusion. It also appears that neither petitioner nor respondent has thus far considered the same matters. Hence it is submitted that the brief of amicus will be helpful to this Court.

For the foregoing reasons, our motion for leave to file the attached amicus curiae brief should be granted.

Respectfully submitted
on behalf of the Appellate
Committee of the California
District Attorneys Association

IRA REINER
District Attorney of
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By

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BRIEF OF AMICUS CURIAE

Amicus Curiae, Appellate Committee of the California District Attorneys Association and Ira Reiner, District Attorney of Los Angeles County, submit this brief accompanied by motion for leave to file the same, pursuant to Rule 36.3.

INTEREST OF AMICUS CURIAE

The Appellate Committee of the California District Attorneys Association is a committee created by the district attorneys of California to utilize and coordinate the resources of district attorneys offices throughout the state, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal offenses. Upon review of the instant matter, the Committee has concluded that the outcome of this case will have substantial impact upon the administration of criminal justice throughout California should this Court hold that a defendant has a constitutional right of access to the presumptively confidential records of a public agency pertaining to the alleged victim of sexual offenses. Accordingly, the Committee has decided to

seek permission to file an amicus curiae brief herein. The Office of the District Attorney of the County of Los Angeles has been requested to prepare and submit this brief. The District Attorney of the County of Los Angeles is an authorized law officer of the county, which is a political subdivision of the State of California. (See Rule 36.4.)

SUMMARY OF ARGUMENT

Our argument is that the Pennsylvania Supreme Court has erroneously understood the Sixth Amendment right of confrontation as entailing the right of a defendant to have access to the confidential records of a public agency of the child-victim. This misinterpretation of the Sixth Amendment rests upon a misreading of Davis v. Alaska, 415 U.S. 308 (1974). Moreover, this supposed right is not required by due process of law since this court has upheld the validity of the Jencks Act (18 U.S.C.

§3500). The discovery permitted by the Jencks Act of statements made by government witnesses after their direct testimony does not include the right of independent access to government records for the defendant.

ARGUMENT

I

THE SIXTH AMENDMENT RIGHT OF CONFRONTATION DOES NOT INCLUDE THE RIGHT OF A DEFENDANT TO HAVE ACCESS TO THE PRESUMPTIVELY CONFIDENTIAL RECORDS OF A PUBLIC AGENCY PERTAINING TO THE COMPLAINANT

In the instant case, defendant was charged with sexual offenses involving his minor daughter. Prior to trial, defendant sought access to the confidential records of a public agency pertaining to the complainant in order to obtain information which might impeach or discredit

her, or which might reveal potential witnesses. On appeal from the judgment of conviction, the intermediate state appellate court concluded that there was a violation of defendant's Sixth Amendment rights due to the failure of the trial court to have allowed him access to his daughter's confidential records. That court determined that the appropriate remedy was to require that the trial court make an in camera inspection of the records, that the trial court make available to the defendant only those parts of the records which the trial court determined to constitute verbatim statements (or the equivalent) by the complainant, and that defense counsel be permitted access to the entire record reviewed in camera by the trial court in order to thereafter argue

relevance. The Pennsylvania Supreme Court also concluded that the trial court erred in refusing defendant access to the confidential records pertaining to his daughter. That court remanded the matter to the trial court with instructions that defendant, through his counsel, be granted access to such records. Counsel would then be permitted to argue to the trial court what use, if any, could have been made of the records in cross-examining the complainant or in presenting other evidence. The trial court was directed to vacate the judgment and grant a new trial unless it was convinced that any error was necessarily harmless.

The Pennsylvania Supreme Court concluded that the trial court erred in refusing defendant access to his daughter's confidential records because it found persuasive his argument that "his Sixth

Amendment rights require that he gain access to the entire file so that determinations concerning what information might be useful to the defense may properly be made by an advocate." (Commonwealth v. Ritchie, 502 A.2d 148, 150 (1985).) The opinion of the Pennsylvania high court discloses that that court reached its conclusion because of its interpretation of Davis v. Alaska, 415 U.S. 308 (1974). In Davis, this Court held that the Sixth Amendment right of confrontation required that a defendant be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status as a juvenile delinquent. Such cross-examination was permissible, this Court declared, notwithstanding that it would conflict with a state's asserted interest in preserving the confidentiality

of juvenile adjudications of delinquency. In the instant case, the Pennsylvania Supreme Court explained: "Since the use of that which is within the jurisdiction of the [trial] court must conform to the fundamental law of the land, the defendant's entitlement to [his daughter's confidential records] is therefore to be determined by those Sixth Amendment principles heretofore considered." (502 A.2d at 153.) The Pennsylvania high court significantly stated, "As in Davis, supra, we find that the Commonwealth's interest in maintaining the confidentiality of these records may not override a defendant's right to effectively confront and cross-examine the witnesses against him." (Id.) Thus because of its reading of Davis, the Pennsylvania Supreme Court determined that Ritchie had a Sixth Amendment right to inspect the presumptively

confidential records of a public agency pertaining to his daughter. This relief was held to be constitutionally required by the Pennsylvania Supreme Court in addition to the remedy, provided by the Superior Court of Pennsylvania, by which the trial court after an in camera inspection of the confidential records would make available to defendant only those parts which it determined to constitute verbatim statements (or their equivalent) by the complainant regarding abuse, in order "that their relevancy might be determined and their uses in testing credibility ascertained." (Commonwealth v. Ritchie, supra, at 150.)

Contrary to the Pennsylvania high court's position, we submit that the Davis opinion does not establish any principle by which the Sixth Amendment right of confrontation entails discovery

rights ~~for defen~~dants not already required by due process of law. As this Court has noted in Delaware v. Fensterer, 106 S.Ct. 292, 294 (1985), "This Court's Confrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination." Clearly, the instant case is one which does not fall within either category.

What has happened is that the Pennsylvania Supreme Court overlooked this Court's decision in United States v. Bagley, 105 S.Ct. 3375 (1985). In Bagley, this Court declared that the failure of prosecutors to assist the defense by disclosing information that might be helpful in conducting cross-examination of prosecution witnesses amounts to a constitutional violation, requiring the reversal

of a resulting conviction, only if the evidence in question is material. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. This Court in Bagley expressly rejected the view that the government's failure to disclose the requested impeachment evidence that the defense would use to conduct an effective cross-examination of prosecution witnesses requires automatic reversal because it threatened the defendant's right to confront adverse witnesses. (105 S.Ct. at 3380-3381.)

As this Court explained the matter in Bagley, supra, at 3381:

> Moreover, the [Court of Appeal's] reliance on Davis v. Alaska for its "automatic reversal" rule is misplaced. In

Davis, the defense sought to cross-examine a crucial prosecution witness concerning his probationary status as a juvenile delinquent . . . . Pursuant to a state rule of procedure and a state statute making juvenile adjudications inadmissible, the trial judge prohibited the defense from conducting the cross-examination. This Court reversed the defendant's conviction, ruling that the direct restriction on the scope of cross-examination denied the defendant "the right of effective cross-examination which 'would be constitutional error of first magnitude and no amount of showing of want of prejudice would cure.' [Citation.]" . . . .

The present case, in contrast, does not involve any direct

restriction on the scope of cross-examination. The defense was free to cross-examine the witnesses on any relevant subject, including possible bias or interest resultint from inducements made by Government. The constitutional error, if any, in this case was the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination.

The Pennsylvania Supreme Court, it is clear, misunderstood Davis when it concluded in the instant case that defendant's Sixth Amendment right of confrontation includes a discovery right, i.e., the right of the defendant to inspect the confidential records of his daughter. Having shown that the Pennsylvania high court

erred in this respect, we turn our attention to whether due process of law requires such discovery.

II

DUE PROCESS OF LAW DOES NOT REQUIRE THAT THE DEFENDANT HAVE THE RIGHT OF ACCESS TO PRESUMPTIVELY CONFIDENTIAL RECORDS CONCERNING THE COMPLAINANT

Due process of law does not require that the defendant in the instant case have the right of access to presumptively confidential records of the complainant. Due process of law, as we have seen, only requires that the prosecution disclose evidence, whether exculpatory or impeachment, to the defense only if it is material, i.e., if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. (United States v. Bagley, supra, at 3381.)

Hence permitting access for Ritchie to the entire confidential file of a public agency pertaining to his daughter is not required by due process of law. As this Court declared in Bagley: "An interpretation of Brady [v. Maryland, 373 U.S. 83 (1963)] to create a broad, constitutionally required right of discovery 'would entirely alter the character and balance of our present systems of criminal justice.' [Citation.] Furthermore, a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments." (105 S.Ct. at 3380 n. 7.)

Additionally determinative of the second issue, i.e., whether due process of law requires the discovery right in question, are the decisions of this Court

concerning the Jencks Act (18 U.S.C. §3500). Since its enactment in 1957, this statute "and not the Jencks decision [Jencks v. United States, 353 U.S. 657 (1957)] governs the production of statements of government witnesses for a defendant's inspection at trial."[1/]

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1. Rule 26.2, Federal Rules of Criminal Procedure, places in the criminal rules the substance of the Jencks Act with respect to the production of statements of defense as well as prosecution witnesses. Subdivision (a)(2) of Rule 16 provides that, with the exception of reports of examinations and tests as therein specified, the pretrial discovery authorized by Rule 16 does not pertain to "statements of government witnesses or prospective government witnesses except as provided in 18 U.S.C. §3500."

In Palermo v. United States, 360 U.S. 343, 353 n. 11 (1959), this Court assumed the validity of the Jencks Act with the statement:

> The statute as interpreted does not reach any constitutional barrier. . . . Much of the law of evidence and of discovery is concerned with limitations on a party's right to have access to, and to admit in evidence, material which has probative force. It is obviously a reasonable exercise of power over the rules of procedure and evidence for Congress to determine that only statements of the sort described in (e) are sufficiently reliable or important for purposes of impeachment to justify a requirement that the Government turn them over to the

defense.

Although subsection (c) of the Jencks Act specifically provides for an in camera determination in order for the trial court to rule on the government's claim that a witness' statement contains matter which does not relate to the subject matter of his testimony, this Court in Palermo expressed approval of the practice of having the Government submit the statement to the trial judge for an in camera determination of whether its production is compelled by the statute. This Court declared in Palermo that "[t]he Act's major concern is with limiting and regulating defense access to government papers, and it is designed to deny such access to those statements which do not satisfy the requirements of (e), or do not relate to the subject matter of the witness' testimony. It would indeed defeat this design

to hold that the defense may see statements in order to argue whether it should be allowed to see them." (360 U.S. at 354. Emphasis added.)

The validity of the Jencks Act was confirmed in Scales v. United States, 367 U.S. 203, 258 (1961). This Court additionally declared: "It is enough to say here that there can be no complaint by a criminal defendant that he has been denied the opportunity to examine statements by goverbment witnesses which do not relate to the subject matter of their testimony. . ." (Id.)

Given that this Court has upheld the validity of the Jencks Act, which limits discovery of statements of government witnesses who have testified at federal trials, it follows that due process of law does not require that the defendant in the instant case have access

to the confidential records of a public agency pertaining to his daughter.

CONCLUSION

For the foregoing reasons, amicus submits that the decision of the Pennsylvania Supreme Court remanding the matter to the trial court with instructions that respondent, through his counsel, be granted access to the confidential records pertaining to complainant be reversed. Sensitivity to the constitutional rights of persons accused of crime should not swamp, as it were, concern for the legitimate interests of the victims of crime, particularly juvenile victims of sexual offenses. It is disconcerting that the Pennsylvania high court has resolved an issue of discovery in a criminal prosecution by misunderstanding this Court's decisions in a matter of federal

constitutional law. It is even more disconcerting that, purportedly to vindicate the defendant's constitutional rights, he is to be given unrestricted access to those presumptively confidential records of a public agency pertaining to his daughter, the alleged victim of sexual offenses with which he has been charged and convicted. The scope of this discovery order is almost unbelievably broad for it extends to all the contents of the confidential records of the defendant's daughter. The value of her interest with respect to the most intimate aspects of her life has been reduced to nothing by the Pennsylvania Supreme Court. We urge that by vindicating her privacy, as well as that of the Commonwealth of Pennsylvania in justice, this Court will send a signal throughout the land that the rights of all defendants

can be adequately protected by the judicial system without subjecting the victims of crime to the trauma of disclosing information which has been given to governmental agencies in confidence.

Respectfully submitted on
behalf of the Appellate
Committee of the California
District Attorneys Association

IRA REINER
District Attorney of
Los Angeles County

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ARNOLD T. GUMINSKI
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CERTIFICATE OF SERVICE BY MAIL

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849 South Broadway, 11th Floor
Los Angeles, California 90014

No: 85-1237
October Term, 1985

PEOPLE OF THE STATE OF
PENNSYLVANIA,

Petitioner,

v.

GEORGE F. RITCHIE,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed by the County of Los Angeles as a Deputy District Attorney, and I am a member of the Bar of the United States Supreme Court and representing the petitioner herein. My business address is 849 South Broadway, 11th Floor, Los Angeles, California 90014.

I have served the within MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF as follows: By placing three copies in a separate envelope addressed to:

BOB COLVILLE
District Attorney
County of Allegheny
303 Court House
Pittsburgh, Pennsylvania 15219
Attn: Edward Marcus Clark, Esq.

JOHN H. CORBETT, JR., ESQ.
Office of the Public Defender
County of Allegheny
1520 Penn Avenue
Pittsburgh, PA 15222

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at Los Angeles, California, on the 8th day of August, 1986.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 8, 1986, at Los Angeles, California.

ARNOLD T. GUMINSKI

85-1347

In The

Supreme Court of the United States

October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

GEORGE F. RITCHIE,

Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF *AMICI CURIAE* PENNSYLVANIA COALITION AGAINST RAPE AND PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

THE PENNSYLVANIA COALITION AGAINST RAPE (PCAR) is a state-wide coalition of sexual assault centers which sets standards for the delivery of services to child and adult victims of sexual assaults. PCAR operates a clearinghouse for its member organizations which provide direct counselling to victims of sexual assault and training for the victim counselors and advocates. PCAR also trains personnel of public and private institutions which provide direct services to sexual assault victims. In 1985, PCAR and its thirty-seven subcontracting organizations served 12,960 child and adult victims of sexual assault and provided 119,054 hours of direct services to those victims.

THE PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE (PCADV) is a state-wide

coalition of domestic violence centers which sets standards for the delivery of services to battered women and their dependent children. PCADV operates as a clearinghouse for its member organizations which provide shelter and direct counselling to victims of battering. In 1985, PCADV and its forty-four member organizations served 47,630 women and children and member organizations provided 127,388 shelter days.

Both PCAR and PCADV are not-for-profit organizations and are the sole source contractors, through the Pennsylvania Department of Public Welfare, for sexual assault and domestic violence services in Pennsylvania.

ARGUMENT

THE COMMONWEALTH OF PENNSYLVANIA'S SOUND PUBLIC POLICY PURPOSE, IN SAFEGUARDING THE CONFIDENTIALITY OF RECORDS OF REPORTED CHILD ABUSE, WILL BE EXTINGUISHED IF THE DECISION BELOW IS NOT REVERSED.

It is beyond cavil that a State has an "independent interest in the well-being of its youth..." **Ginsberg v. New York,** 390 U.S. 629, 640 (1968) **reh.den.** 391 U.S. 971 (1968). Indeed, and as noted by this Court in **Michael M. v. Superior Court of Sonoma County,** 450 U.S. 464, 472 n.8 (1981): "[A] State has even broader authority to protect the physical, mental, and moral well-being of its youth, than of its adults." It is within this jurisprudential framework that the Supreme Court of Pennsylvania's decision below must be assessed.

Identifying an "urgent need" to protect innocent child-victims of abuse and recognizing the vital importance of encouraging complete reporting of suspected child abuse, the Commonwealth of Pennsylvania enacted the Child Protective Services Law, 11 PA.CONS.STAT.ANN. §2201, **et seq.** (Purdon's 1986).[1] Critical to the fulfillment of the salutary purpose of this law is a provision mandating the confidentiality of records maintained by the local child protective service agencies which are empowerd to receive and investigate reports of child abuse and to provide counselling to abused children. In **sub silentio** striking that confidentiality provision down, the Supreme Court of Pennsylvania ravaged the entire statute.

[1]Child Abuse is defined as "serious physical or mental injury...or sexual abuse or sexual exploitation, or serious physical neglect, of a child under 18 years of age..." 11 PA.CONS.STAT.ANN. §2203.

Amici urge this Court to reverse and thereby restore to innocent child-victims of abuse the statutory safeguards which mandate that the identity of reporters and the counselling records of the victims of child abuse remain confidential.[2]

To allow the decision below to stand would discourage persons from reporting child abuse by removing the much-needed cloak of confidentiality and would concomitantly have a devastating impact on the ability of the State "to protect the physical, mental, and moral well-being of its youth" by interfering with the essential counselling services being provided to the child.

[2]The Child Protective Services Law creates two categories of reporters. The first category is commonly referred to as "mandated reporters" and the second encompasses all other persons. By statute "mandated reporters" include, **inter alia**, medical providers, school personnel, social service and other child care workers, mental health professionals and law enforcement officials. 11 PA.CONS.STAT.ANN. § 2204(c). The identity of both classes of reporters is made confidential pursuant to this statute. 11 PA.CONS.STAT.ANN. § 2215(a).

The position advanced by **Amici** finds strong statistical correlation in empirical evidence compiled by the Pennsylvania Department of Public Welfare, Office of Children, Youth and Families. In its 1985 Child Abuse Report, the Department charted the dramatic increase in reports of child abuse in the ten (10) years since the enactment of the Child Protective Services Law. In 1976, the first full year that the statute was in effect, there were 6,415 reports of suspected child abuse but that number doubled in 1977, with 12,939 cases. By 1985, there were 20,980 reports of suspected child abuse, an increase of 227% over the initial reports from 1976.[3]

[3] **1985 Child Abuse Report**, Commonwealth of Pennsylvania, Department of Public Welfare, Office of Children, Youth and Families (May 1985). Pennsylvania's statistical analysis reveals that 70% of all child abusers were in a parenting or guardian-type relationship to the child and that only 12% of the abusers were not related, by consanguinity or affinity, to the child. Moreover, in 1985, nearly half (46%) of the reports of suspected child abuse were made by persons not mandated by the Child

Extrapolating from these base numbers, it is statistically reasonable to assert that the progressive growth rate of reports of suspected child abuse will continue in the coming decade.[4] But, it is also reasonable to conclude that reports of suspected child abuse will dramatically decline if the identity of heretofore anonymous reporters is disclosed to the abusers. This is so because child abuse typically occurs in private with only the most obvious symptoms of physical and psychological abuse being observable by others. Thus, the innocent child-victim will be relegated to the sec-

3(Cont'd.)
Protective Services Law to report. **See 1985 Child Abuse Report,** Charts 1, 3 and 9 (extrapolations).

[4] The same pattern of increased reports is evident from statistics compiled on a national level. In 1963, there were approximately 150,000 reports of suspected abuse but by 1972 there were 610,000 reports and in 1981, 1.3 million children were reported to be abused. Besharov, "Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention, 8 Harv.J.L. & Pub. Pol. 539, 545 (1985).

ret confines of his or her abusers world, casting aside the "urgent need" to protect children who are the intended beneficiaries of the statute.

If, as the decision below requires, the identity of reporters is routinely disclosed to the perpetrators of child abuse, reports of suspected child abuse will decline resulting in continuing patterns of abuse as the offenders will remain safe from public revelation and punishment. The willingness of neighbors to become involved, to take the necessary first step of reporting suspected child abuse, will cease once that good neighbor is told that the suspected perpetrator may learn of his or her identity, simply by making a request for the name of the reporter. A person who learns of or observes evidence of suspected abuse against an innocent child, and makes a report, can

only logically assume that the same violent perpetrator will retaliate, armed with the knowledge that the innocent reporter has exposed his criminal behavior and subjected him to possible punishment. Similarly, the school teacher, nurse, social service or child care worker, all of whom are mandated reporters, may be reluctant to do so because of the obvious physical danger to themselves once their identity is revealed to the perpetrator. Likely, any retaliation would include the child and other siblings as well as the reporter and his or her family.

Absent an assurance that his or her identity will remain confidential, the willing neighbor (a voluntary reporter) and the concerned professional (a mandated reporter) will become unwilling participants in the escalated physical, mental and sexual exploitation of children, by opting not to come forward except in the most atrocious

cases.[5] Thus, the net effect of permitting disclosure of the identity of reporters will be to dissuade reports of abuse. Yet, this is precisely the anomalous result of the Pennsylvania Supreme Court's decision -- a decision which analytically fails to consider precisely what hangs in the balance.

The competing policy concerns of the accused and the public may and have been struck in favor of confidentiality and against disclosure of the identity of the source of information. In an analagous context, involving anonymous informants or tipsters, this Court has affirmed the non-disclosure of identity as against an ac-

[5]Clinical studies of the long-term effects of child sexual abuse show alarming results. Stigmatization, reduced self-esteem, impaired adult adjustment and a susceptibility to continuing victimization have all been directly linked to such childhood experiences. **See D. Finkelhor,** Child Sexual Abuse: New Theory and Research, Chapter 12 (1984).

cused's assertion of his Sixth Amendment right to confront adverse witnesses. **See Roviaro v. United States,** 353 U.S. 53 (1957) (anonymous informant in narcotics case). **See generally, Illinois v. Gates,** 462 U.S. 213, 237-238 (1983) (adopting a totality of circumstances approach in cases where anonymous tipsters provide information which aids in establishing probable cause for search warrants and recognizing that "anonymous tips. . .frequently contribute to the solution of otherwise 'perfect crimes'.").

Indeed, the **Roviaro** Court groped with the tension which exists between an accused's Sixth Amendment rights and the state's fundamental interest in protecting its citizenry. Recognizing that an accomodation must be made, this Court resolved that the public interest extended beyond

mere private interest and explained its rationale as follows:

> The purpose of the privilege [of withholding the identity of informants] is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligations of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Roviaro v. United States, 353 U.S. at 59.[6] This admonition applies with equal force where the victims of crime are children and the adult perpetrators would escape, having accomplished the "perfect crime". The critical statement in **Roviaro** as applied to this case is the Court's refusal to adopt a **per se** disclosure rule. Rather, **Roviaro** made clear that "no fixed rule with respect to disclosure is justifiable".

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[6] In **Roviaro**, the informant was not only a material witness who was present at the time of the drug transaction, but also played a prominent role in the

Roviaro v. United States, 353 U.S. at 62. Here, without even considering the impact of its ruling the Pennsylvania Supreme Court adopted a **per se** rule, granting full disclosure of the entire file of information.

The Commonwealth of Pennsylvania reasonably and rationally adopted a confidentiality provision as regards particular reporters of suspected child abuse in order to embolden citizens "to communicate their knowledge of the commission of crimes". To dissuade these people from courageously stepping forward, by disclosing their identity, will send a clear message to reporters as it will have a chilling effect on the reporting process.

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[6] (Cont'd.)
crime itself and was the only possible defense witness. Given this particular situation, the Court weighed the equities and required disclosure which if not made would result in dismissal.

During its last Term, this Court reiterated that the elemental guarantee of the Confrontation Clause of the Sixth Amendment is the opportunity for cross-examination of adverse witnesses. **Delaware v. VanArsdall**, U.S. , 106 S.Ct. 1431, 1435 (1986); **Delaware v. Fensterer**, U.S. , 106 S.Ct. 292, 295 (1985) **(per curiam)**. But the Confrontation Clause is properly invoked only when a witness appears in court to offer probative, relevant, material and admissible evidence. **Cf. Tennessee v. Street**, U.S. , 105 S.Ct. 2078 (1985) (no violation of confrontation right where, on rebuttal, accused's co-defendant's confession read to the jury; co-defendant not offered as a witness.).

If an individual merely provides a source of information, whether as in **Roviaro/Gates** to provide some probable cause for an arrest or the issuance of a

search and seizure warrant, the Confrontation Clause is not implicated. Just as the identity of informants is not required to be disclosed, so too the identities of reporters of suspected child abuse should not be disclosed unless they are actually presented as a witness. Only then is identity a matter of constitutional dimension. **See Smith v. Illinois**, 390 U.S. 129 (1968).[7] Absent the actual offering of testimony there is no legitimate public policy which mandates disclosure. To the contrary, sound public policy demands confidentiality -- to protect the rights of children who cannot themselves reveal

[7] The protection of mandated reporters is compromised by the mere fact that they have a statutory duty to report when based on their training and experience they have reason to believe that a child is abused. 11 PA.CONS.STAT.ANN. §2204(1). They will be at further risk if their identity is routinely disclosed to a perpetrator.

what their tormentors have done to them[8] and to protect the anonymous reporter from threats, harassment and potential physical harm. It is this public policy which the Supreme Court of Pennsylvania has extinguished and which must be reversed.

CONCLUSION

The State's paramount interest in protecting innocent child-victims of abuse is fostered by maintaining the confidentiality of the identity of reporters of suspected child abuse and of the records compiled

[8]Studies have shown that child abuse is significantly underreported. Professionals did not report "more than half of the maltreatment of children" they saw and "50,000 children with observable injuries severe enough to require hospitalization were not reported". The conclusion: "Nonreporting can be fatal". Besharov, Child Abuse and Neglect, 22 Trial 8 (August 1986) (relying on U.S. National Center on Child Abuse and Neglect, National Study of the Incidence and Severity of Child Abuse and Neglect, ch.6 (DDHS 1981).

by child protective services agencies. **Amici** respectfully urge this Honorable Court to restore the confidentiality which is critical to encouraging complete reporting of child abuse by reversing the decision below.

Respectfully submitted,

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No. 85-1347

IN THE

Supreme Court of the United States

October Term, 1985

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

GEORGE F. RITCHIE,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF OF *AMICUS CURIAE* COUNTY OF ALLEGHENY, PENNSYLVANIA ON BEHALF OF ALLEGHENY COUNTY CHILDREN AND YOUTH SERVICES IN SUPPORT OF PETITIONER

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Question Presented for Review

Does the Sixth Amendment to the United States Constitution require that a defendant accused of sexually assaulting his minor daughter be granted unlimited access to Allegheny County Children and Youth Services case records regarding the child victim when such access would conflict with vital state interests in preserving the confidentiality of such case records?

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Statement of the Interest of the *Amicus Curiae*, Allegheny County Children and Youth Services

The Commonwealth of Pennsylvania enacted the Child Protective Services Law in November, 1975. 11 P.S. §2201 *et seq.* The stated purpose of the law was to

encourage more complete reporting of suspected abuse of children, to protect abused children from further abuse, to provide rehabilitation services to the children and parents involved, and, wherever appropriate, to stabilize the family. 11 P.S. §2202.

Because the entire focus of this Legislation is the protection of children and the provision of rehabilitation services to children and their families, the responsibility for fulfilling the purposes of the Act was not lodged in any law enforcement agency, but in a "Child Protective Service" to be established in each Children and Youth Service agency in every county in the Commonwealth of Pennsylvania. 11 P.S. §2216(a).

Allegheny County is a political subdivision of the Commonwealth of Pennsylvania and has an estimated population of 1,430,375. Allegheny County Children and Youth Services (hereinafter "CYS") is the County agency charged with responsibility for dependent, neglected and abused children. It maintains a Child Protective Service department to carry out the terms of the Child Protective Services Law.

CYS has a substantial interest in the matter before this Honorable Court because the case records at issue in this case are its records. The decision of the Pennsylvania Supreme Court at issue would allow a defense attorney unfettered access to Child Protective Service records of any child that is the subject of an abuse report or any family that has received case work service from CYS Child Protective Service.

Moreover, to the extent that the decision of the Pennsylvania Supreme Court interferes with CYS' statutory duty to carry out the goals of the Child Protective Services Law, CYS has a substantial interest in the matter before the Court.

ARGUMENT

(A) The Decision Of The Pennsylvania Supreme Court Seriously Undermines The Critical Goal Of Identifying Abused Children And Protecting Them From Further Abuse.

One of the shocking revelations of recent years is that physical and sexual abuse of children is tragically widespread, and that, until recently, it has usually gone undetected and unremedied. The success of the Child Protective Service Law in identifying these helpless victims and protecting them from further abuse is one of the public policy triumphs of the last decade.

In short, the Child Protective Services Law requires a Child Protective Service to receive reports of abuse on a 24-hour, 7 day-a-week basis. The Act further requires each Child Protective Service to commence investigation of each report of abuse within 24 hours, to make a determination within 30 days of whether the reported abuse is "founded," "indicated," or "unfounded," and to take any necessary steps to protect any abused child from further abuse. 11 P.S. §2217(1) (4) (6) and (7).

According to the most recent report of the Pennsylvania Department of Public Welfare (hereinafter "DPW"), the DPW's "Childline" abuse reporting service and the Child Protective Services of the various counties received 20,980 reports of suspected child abuse in 1985. Of these, 7,724 or 36.8% were substantiated. This represents a tremendous increase in the reporting of suspected abuse of children over 1976, the first year following enactment of the Child Protective Services

Law, during which only 6,415 reports of suspected abuse were received, of which 44.4% were substantiated.[1]

In 1985, Allegheny County's Child Protective Service alone received 2,C02 reports of suspected abuse, of which 750 or over 37% were substantiated.

The key to the effectiveness of the reporting system is the assurance that reporters will remain anonymous. Amendments to the Child Protective Service Law adopted in 1982 specify certain professionals, such as medical and school personnel, who are legally obligated to make reports of suspected abuse. 11 P.S. §2204. Only 54.1% of the reports of suspected abuse, however, are received from this source. The balance of reports, or 45.9%, come from "non-mandated reporters", usually family members, family friends or neighbors.[2] Thus, these non-mandated reporters are crucial to the successful functioning of the child abuse reporting system.

The Pennsylvania Supreme Court's decision will effectively destroy the incentive of non-mandated reporters to report suspected child abuse because it virtually guarantees that the name of the reporter will eventually be revealed to the perpetrator. Because the Child Protective Service Law requires every complaint of child abuse to be relayed to the appropriate child protective service for investigation, the records of that

[1] 1985 Child Abuse Report of the Commonwealth of Pennsylvania Department of Public Welfare Office of Children, Youth and Families, pp. 20-21. (The Child Protective Services Law requires the Department of Public Welfare to submit an annual report to the Governor and State Assembly on the operation of the Commonwealth's central register of child abuse and the Child Protective Services of the various counties, including full statistical analysis on the reports of suspected child abuse. 11 P.S. §2219(a).)

[2] 1985 Child Abuse Report, *supra*, p. 8.

service necessarily contain the name of the reporter. Ironically, because of the Pennsylvania Supreme Court's decision, the more serious the abuse, the more likely that the reporter's name will be revealed, due to the increased possibility that a criminal prosecution will result. Thus, the greater the danger to the child, the greater the incentive for the family member, friend or neighbor *not* to report the suspected child abuse.

The stronger the guarantee of anonymity for reporters of suspected abuse, the more likely non-mandated reporters, such as family members, friends or neighbors of the abused child, will report suspected abuse. The more likely that their names will be revealed to the suspected perpetrator, the less likely they will be to make a report.

By making a non-mandated reporter's anonymity less likely, the decision of the Pennsylvania Supreme Court clearly undermines the vital interest of the Commonwealth and of CYS in identifying and in protecting children from physical and sexual abuse.

(B) The Decision Of The Pennsylvania Supreme Court Seriously Undermines The Commonwealth's Interest In The Rehabilitation Of Child Abuse Victims And The Preservation Of Families.

The stated goals of the Child Protective Services Law include providing rehabilitation service to children and his or her parents. 11 P.S. §2202. This rehabilitative element of the Child Protective Services Law is almost as important as protecting the child from abuse. Its purpose is to enable a child and his or her family to cope with the trauma of abuse and to preserve the stability of the family where possible.

This goal explains the Child Protective Services Law's express requirement that child protective services "treat" as well as prevent child abuse through "multi-disciplinary teams, instruction and education for parenthood, protective and preventive social counseling, emergency caretaker services, emergency shelter care, emergency medical services, and the establishment of groups organized by former abusing parents to encourage self-reporting and self-treatment of present abusers." 11 P.S. §2216(d). Obviously, these are impossible goals unless victims, parents and even abusers feel they are free to talk honestly with a social worker or counselor about incidents of abuse.

One of the main difficulties Allegheny County Children and Youth Services has faced in dealing with the child abuse problem has been the reluctance of children to admit abuse. Even when children admit abuse, they often initially understate the extent or frequency of the abuse. It may take frequent or extended conferences with a caseworker or counselor before the full details of the abuse are revealed.

This reluctance is not only a barrier to discovering abuse or confirming reports of abuse, but it prevents effective counseling and rehabilitation of the victim. One of the major reasons for a child's reluctance to discuss abuse is the fear that his or her statements will be revealed to the abuser or that the child will be punished for his or her statements.

Nothing is more likely to guarantee that children will be discouraged from reporting or seeking help from a caseworker or counselor for abuse than the knowledge that their statements might be revealed to the abuser through the criminal justice process or that they will be subjected to hostile cross-examination about their statements.

It is ironic that at a time when legislatures, including the Pennsylvania Legislature, are taking steps to protect child witnesses in criminal trials for child abuse through testimony by closed-circuit television and by other means,[3] the Pennsylvania Supreme Court's decision guarantees that children will receive no protection in the social service context, in which a child's participation is aimed at helping the child recover emotionally from the trauma of abuse.

Just as the Pennsylvania Supreme Court's decision seriously undermines the important goal of identifying abused children and protecting them from further abuse, it effectively destroys the Child Protective Services Law's goal of providing rehabilitative services to an abused child and his or her family by opening confidential case records, including statements made as part of the rehabilitation process, to a defense lawyer in a criminal trial.

(C) The Sixth Amendment Does Not Require That Defense Counsel Be Given Access To The Case Service Records Of Allegheny County Children And Youth Services In This Case.

Given the deleterious effect the Pennsylvania Supreme Court's decision will have on the Commonwealth's goal of identifying abused children, protecting them from further abuse and providing rehabilitation services to the children and their families, the Sixth Amendment does not require opening Allegheny County Children and Youth Services' records to review by defense counsel.

The Sixth Amendment of the United States Constitution guarantees defendants in criminal prosecutions the right to confront and cross-examine

[3] 1986 Pa. Legis. Serv. No. 1, Act 1986-14.

witnesses. This Court has repeatedly recognized, however, that this right is not absolute. *See, e.g., United States v. Nixon,* 418 U.S. 683 (1974); *Washington v. Texas,* 388 U.S. 14 (1967). Certain constitutional, statutory and common law privileges exist in order to protect relationships of such significance and value of society that they outweigh the interest of society in obtaining any possible evidence disclosed in the context of that relationship.

The test of the validity of these privileges in light of the powerful demands of the Sixth Amendment is a balancing of the society's interest in protecting the relationship, and, in particular, the potential harm that would be done to the existence and value of the relationship by breaching its confidentiality, compared to the importance of obtaining possible evidence. *United States v. Nixon, supra; McCray v. Illinois,* 386 U.S. 300 (1967).

The interests at stake in this case, interests that can be guaranteed only by protecting the confidentiality of child abuse case service records, are as weighty as any of those protected by recognized privileges, such as attorney-client, priest-penitent and doctor-patient privileges. As in the case of recognized privileges, without the guarantee of confidentiality these interests will be destroyed. For these reasons, the Pennsylvania Supreme Court's reliance on *Davis v. Alaska,* 415 U.S. 308 (1974) is misguided.

In *Davis v. Alaska,* this Honorable Court held that, despite an Alaska statute guaranteeing the confidentiality of the records of juvenile offenders, defense counsel was entitled to use a prosecution witness's juvenile records to show that the witness was unreliable and had an ulterior motive in testifying

against the defendant because the witness was on probation and was concerned that he was a suspect in the same burglary for which the defendant was charged.

This Honorable Court applied the traditional balancing test, measuring the state's interest in preserving the confidentiality of juvenile records against the extremely limited intrusion that would result from allowing their use under the specific circumstances of the case.

Obviously, permitting use of juvenile records under the circumstances existing in *Davis v. Alaska* would allow the vast majority of juvenile records in the State of Alaska to remain confidential. The state's interest in rehabilitation was not seriously undermined by this Honorable Court's decision, which involved the specific records of a specific juvenile in a unique case. Moreover, the importance of the records to the defense in *Davis v. Alaska* was overwhelming, given that they were the sole means of proving the witness's strong personal interest in putting responsibility for the burglary on the defendant.

In contrast to *Davis v. Alaska,* the ruling of the Pennsylvania Supreme Court effectively undermines the confidentiality of records for juveniles who are subjected to such serious sexual and physical abuse that a criminal prosecution results. In contrast to *Davis v. Alaska,* the ruling of the Pennsylvania Supreme Court in the instant case will lead to wholesale opening of the case records to defense attorneys, revelation of the named reporters of suspected abuse, and the use of statements made in the context of rehabilitation and therapy in cross-examination.

Clearly, comparing the potential damage to the societal interests involved, it is hard to imagine two cases more dissimilar than *Davis v. Alaska* and the instant case. The only true similarity is the inconsequential fact that they both involve confidential records and both involve juveniles. In fact, the nature of the confidentiality at issue in the instant case involves confidential communications either by a witness concerning suspected abuse or a child victim to a counselor or caseworker. This interest is much closer to the traditional common law and statutory privileges, which have been sustained by this Honorable Court, than it is to the interest ordinarily protected by keeping records confidential. As with a client and attorney or a penitent and priest, without confidentiality, the communication by reporters to Child Protective Services or by abused children to caseworkers and, in turn, all records of those communications, will disappear. This is in sharp contrast to the records in *Davis v. Alaska*, which were not records of communications or statements, but records of the objective criminal status of the witness.

The other cases cited by the Pennsylvania Supreme Court are equally inapposite. *Smith v. Illinois*, 390 U.S. 129 (1968), involved the extremely limited ruling that the Sixth Amendment to the Constitution entitled defense counsel to ask a prosecution witness his actual name and address during cross-examination. In *Washington v. Texas*, 388 U.S. 14 (1967), this Honorable Court held that a Texas statute that allowed alleged accomplices to testify in favor of the prosecution in a criminal trial but prohibited them from testifying on behalf of the defense was unconstitutional. Neither of these rulings provides any guidance for resolving the issues before the Court in this case.

Moreover, the specific circumstances of this case tip the balance in favor of the Commonwealth and CYS' interest in preserving the confidentiality of the case records of the child victim. As the Pennsylvania Supreme Court noted, the trial court conducted an *in camera* inspection of the case records and found nothing which would assist the Defendant. Additionally, the prosecution never reviewed the records or even requested material or statements from the records.[4] Finally, the Defendant made only a vague assertion of need for access to the child's case record.

In view of these facts, this Honorable Court should weigh the purely speculative benefit to the Defendant, Ritchie, against the manifest harm to the interest of abused children, and reverse the decision of the Pennsylvania Supreme Court in this case.

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[4] Although recent amendments provide that law enforcement officials are entitled to receive reports of serious physical and sexual abuse, the Secretary of DPW cannot release the name of the reporter of the abuse unless the Secretary determines that disclosure would not endanger that person. 11 P.S. §2215(a)(9) and §2215(c).

Conclusion

For the reasons set forth above, Allegheny County Children and Youth Services joins in the Petition of the Commonwealth of Pennsylvania and requests that the decision of the Pennsylvania Supreme Court be reversed and the verdict of the trial court be affirmed.

Respectfully submitted,

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AMICI CURIAE BRIEF OF THE STATE OF CALIFORNIA ex. rel. JOHN K. VAN DE KAMP, ATTORNEY GENERAL and the STATES OF COLORADO, CONNECTICUT, HAWAII, ILLINOIS, INDIANA, KENTUCKY, LOUISIANA, MAINE, MINNESOTA, MISSISSIPPI, MONTANA, NEW HAMPSHIRE, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WYOMING

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QUESTION PRESENTED

Do the Sixth Amendment rights of confrontation and compulsory process require unrestricted disclosure of presumptively privileged information in child welfare service files without an initial showing of materiality and a judicial *in camera* examination?

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Amici file this brief pursuant to Rule 36.4 of the Supreme Court of the United States.

INTEREST OF AMICI

This brief is respectfully submitted in support of petitioner who

urges reversal of Commonwealth v. Ritchie, 502 A.2d 148 (Pa. 1985).

The Pennsylvania Supreme Court's expansion of the principles announced in Davis v. Alaska, 415 U.S. 308 (1974) is in conflict with federal statutes and seriously undermines the states' interests in protecting children.

Amici, along with numerous other states, have enacted child abuse laws similar to those enacted by Pennsylvania. These laws must comply with federal statutes and regulations which condition eligibility for grants-in-aid on the states' ability to keep child abuse reports and records confidential. The Pennsylvania court's ruling impairs the states' ability to comply with this requirement.

The states also have an interest in protecting and promoting the welfare of children and preventing their mistreatment. The confidentiality of child abuse reports and records is essential in carrying out this vital function.

Moreover, the Pennsylvania decision drastically impairs the states' ability to protect common law and statutory confidential communications generally.

For these reasons, amici oppose Mr. Ritchie's contention that he has a Sixth Amendment right through his attorney of unrestricted access to confidential records regarding the child-victim and her family.

SUMMARY OF ARGUMENT

The Congress of the United States has recognized the problem of child abuse and the need for additional federal efforts to combat it. Congress has thus made funds available to the states for child abuse programs. In order to receive these funds, states must provide that child abuse reports and records are confidential. All fifty states have enacted such laws. The holding of the Pennsylvania Supreme Court conflicts with the federal requirement of confidentiality.

Confidentiality of records is critical to the success of the states' child protection laws. Confidentiality encourages reports of child abuse, enhances investigations and encourages families to seek treatment for their problems. Without confidentiality, the

states are seriously hampered in providing these services to children and their families.

States also have a duty to protect the privacy of the victim. Child abuse files often contain sensitive and personal information about the child and his/her family. The criminal defendant should not be entitled to immaterial private information.

In deciding whether a criminal defendant should have access to child abuse records, the court should balance the defendant's right of access to evidence material to his defense against the public's interest in preventing and treating child abuse and the child's privacy interests. If access is granted, the court should then undertake an <u>in camera</u> review of

the record and allow disclosure of only favorable evidence which is material to guilt, exculpatory evidence, or evidence material to cross-examination. Protective measures should also be taken directing that the information be disclosed only in connection with the current proceedings and that the records be sealed for appellate review.

ARGUMENT

I

THE STATES' INTERESTS IN PRESERVING THE CONFIDENTIALITY OF CHILD WELFARE SERVICE RECORDS ARE COMPELLING.

A. The Decision Of The Pennsylvania Supreme Court conflicts with Federal and State Requirements Of Confidentiality.

(1) The Federal Statutes

In 1974, Congress passed the Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247 (codified as amended at 42 U.S.C.§§ 5101-5107 (1984). The legislative history indicates Congress recognized that thousands of innocent children are beaten, burned, poisoned or otherwise abused by adults each year. (H.R. Rep. No. 685, 93rd Cong., 1st Sess. 2, reprinted in 1974 U.S. Code Cong. & Ad. News 2763-2764.) Witnesses who

testified agreed that estimates available of the incidence of child abuse represent only a small proportion of the number of children who are actually maltreated. The National Center for the Prevention and Treatment of Child Abuse and Neglect in Denver, Colorado, estimated that 60,000 cases of child abuse are reported annually. (Id. at 2764-2765.)

The Act was passed in response to the growing problem of child abuse, the inadequacies of existing prevention and treatment programs at the state level, and the need for a national clearinghouse to compile statistics and provide direction for improvement of child abuse programs. (Id. at 2764-2766.) Congress provided funds to states for the purpose of assisting them in

developing, strengthening and carrying out child abuse and neglect prevention and treatment programs. (See 42 U.S.C. § 5103(b).)

In order to qualify for federal assistance, Congress required states to include certain provisions in their child abuse and neglect laws. These include providing "methods to preserve the confidentiality of all records in order to protect the rights of the child and the child's parents or guardians; . . ." (42 U.S.C. § 5103(b)(2)(E).)

The regulations which implement the Act also require the participating state to provide by statute that all records and reports of child abuse and neglect are confidential and that their unauthorized disclosure is a criminal

offense. (See 45 CFR § 1304.14(i)(1) (1985).) The regulations further provide that a state may authorize disclosure to a narrow class of persons and agencies under limitations and procedures determined by the state. (See 45 CFR § 1340.14(i)(2)(i)-(xi) (1985).) In addition, 45 CFR section 1340.20 requires that the state hold as confidential "all information related to personal facts or circumstances about individuals" involved in child abuse programs or projects. Disclosure of personal information is not allowed, except to those agencies and persons delineated in 45 CFR section 1340.14(i)(2)(i)-(xi).

Further, 42 U.S.C. section 5103(b)(4) requires that programs under Title IV, Parts A and B of the Social Security Act, 42 U.S.C.

section 601 et seq. and section 620 et seq. (Aid to Families with Dependent Children and Child Welfare Services, respectively), comply with the confidentiality requirement set forth in 42 U.S.C.§ 5103(b)(2)(E). Child abuse programs are often administered under the above provisions of the Social Security Act.

The unrestricted access by a criminal defendant to an agency's child abuse files violates these federal statutes and regulations and frustrates Congress' intent to limit access to this information. If a criminal defendant is granted access to a file, the federal mandate of confidentiality requires the court to provide the least intrusive method of disclosure. The court must take steps to preserve

confidentiality to the greatest extent possible.

(2) The States' Statutes [1]

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1. Amici all have mandatory reporting laws and statutes providing confidentiality for child welfare service files:

Colorado (Colo. Rev. Stat. §§ 19-10-103; 19-10-115); Connecticut (Conn. Gen. Stat. Ann. §§ 17-38a, 17-38b, 17-38c, 17-47a, 17-431); Hawaii (Hawaii Rev. Stat. §§ 350-1.1, 350-6); Illinois (Ill. Rev. Stat. ch. 23, §§ 2054, 2061, 5035.1); Indiana (Ind. Code §§ 31-6-11-3, 31-6-11-18); Kentucky (Ky. Rev. Stat. § 199.335); Louisiana (La. Rev. Stat. Ann. § 14:403, 46:56); Maine (Me. Rev. Stat. Ann. tit. 22, §§ 4011, 4008); Minnesota (Minn. Stat. Ann. § 626.556); Mississippi (Miss. Code Ann. § 43-21-353, 257, 259, 261, 267); Montana (Mont. Code Ann. §§ 41-3-201, 205); New Hampshire (N.H. Rev. Stat. Ann. §§ 169:40, 169-C:29, 169:44, 169-C:25, 169-D:25); North Carolina (N.C. Gen. Stat. §§ 7A-543, 115C-400, 7A-552, 7A-675); Oklahoma (Okla. Stat. Ann. tit. 21, § 846); Pennsylvania (P.S. §§ 2204-2214; 2215(a)); Tennessee (Tenn. Code Ann. §§ 37-1-403, 37-1-605, 37-1-408, 37-1-409, 47-1-612; Utah (Utah Code Ann. §§ 78-3b-3, 78-3b-3.5, 78-3b-4, 78-3b-13); Vermont (Vt. Stat. Ann. tit. 33, § 683, 686); Virginia (Va. Code, §§ 63.1-248.3, 63.1-209); Washington (Wash. Rev. Code Ann. § 26.44.030, 26.44.070); West Virginia

California's child abuse statutory scheme was enacted in response to findings similar to Congress', and in compliance with the federal requirement of confidentiality. In 1981, the California Legislature enacted the Office of Child Abuse Prevention. In so doing it declared:

"[C]hild abuse and neglect is a severe and increasing problem in California" (Welf. & Inst. Code,

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(W.Va. Code §§ 49-6A-2, 49-6A-5); Wyoming (Wyo. Stat. §§ 14-3-205, 14-3-207, 14-3-214).

§§ 18950, 18975.1(a)). 2/ It further found that:

> "(a) child abuse is one of the most tragic social and criminal justice issues of our times.
>
> "(b) [v]ictims of child abuse and their families face a complex intervention system involving many professionals and agencies.
>
> "(c) The prevention of child abuse requires the involvement of the entire community." (Welf. & Inst. Code, § 18981(a), (c), and (d).)

On the basis of these findings, a complex and comprehensive statutory scheme was enacted to help plan, develop, and carry out programs to prevent, identify, and treat child abuse and neglect. (Office of Child

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2. In 1983, 126,855 reports of child abuse were made (Calif. Dept. of Justice, Comm. on the Enforcement of Child Abuse Laws). In 1984, 250,314 reports were made (DSS Emergency Response Program Statistical Report). In 1985, 295,570 reports were made. (Id.)

Abuse Prevention, Welf. & Inst. Code, § 18958 et seq.; Child Abuse Prevention Coordinating Councils, Welf. & Inst. Code, § 18982 et seq., Child Abuse Reporting, Pen. Code, § 11166.)

The Department of Social Services and the County Welfare Departments have the task of establishing and operating child welfare resource programs. (Welf. & Inst. Code, § 16500 et seq.) The primary concern of Child Protective Services is not law enforcement but the protection of the child, i.e., removal of the child from the home, if necessary, and placement in therapy and rehabilitative programs. (Welf. & Inst. Code, §§ 358.1, 16501.)

California's reporting laws were enacted to facilitate the investigation of child abuse as well as

the protection of children. (Pen. Code, § 11174.5; People v. Stritzinger, 34 Cal.3d 505 (1983).) These laws impose a mandatory duty upon any child care custodian, medical and non-medical practitioner or employee of a child protective agency to report known or suspected child abuse (Pen. Code, § 11166(a).) These laws also encourage reporting by other persons who know or suspect instances of child abuse. (Pen. Code, § 11166(d).)

The reports required by Penal Code section 11166 must be made to a child protective service (CPS) agency, which is defined as "a police or sheriff's department, a county probation department, or a county welfare department." (Pen. Code, § 11165(k).) The reporting laws also require cross-reporting between these

agencies so that both law enforcement and social service agencies are notified of the child abuse. (Pen. Code, § 11166(g).) The reports must include the name of the person making the report, the name and location of the child, and any information that led the person to suspect the abuse. (Pen. Code, §1116.)

Governmental files on abused children fall into three general categories: (1) law enforcement files, (2) juvenile court records, and (3) child welfare service (CWS) files. Law enforcement files contain the reports mandated by Penal Code section 11166. (Pen. Code, § 11165(k).) The juvenile court files contain interviews with the abused child (Welf. & Inst. Code, §328) as well as a social study prepared by the probation officer and

any study by an appointed child advocate. (Welf. & Inst. Code, § 358.) The social study will include reports, interviews and observations covering the subjects of child protective services, return of the child, visitation rights with grandparents, and termination of parental custody. (Welf. & Inst. Code, § 358.1.)

The contents of CWS files are governed by regulation. (California-DSS-Manual-SS, Div. 30, Regul. 30-276, 30-376, 30-476.) The files include the initial report (Pen. Code, § 11166), as well as information on the abused child and the child's family, covering social, cultural, psychological, and physical factors. (Id., Reg. 30-276.1, 30-376.1, 30-476.) The files also include applications for social

services, eligibility determination documents, medical and dental reports, and emergency shelter care, placement and foster care records. (Id.) In cases where the child has a history of juvenile court involvement, the CWS file also contain all documents submitted to and received from the court. (Id., Reg. 30-276.2, 30-376.2.)

Files on child abuse victims are confidential by statute. Welfare and Institutions Code section 827 creates a conditional privilege for juvenile court records (T.N.G. v. Superior Court, 4 Cal.3d 767, 778-781 (1971); Wescott v. Yuba County , 104 Cal.App.3d 103 (1980)), while Welfare and Institutions Code section 10850 protects the confidentiality of CWS records. (Foster v. Superior Court, 107 Cal.App.3d 218, 228 (1980).

However, the disclosure provisions governing welfare (CWS) files are more restrictive than those governing juvenile court records. Because of the federal mandate of confidentiality for CWS files (42 USCA § 5103(b)(2)(E)), Welfare & Institutions Code section 10850, subdivision (a), limits disclosure of CWS records "for any purpose not directly connected with the administration of such program . . . ." The disclosure of any information which identifies by name or address any applicant or recipient is also prohibited. (Welf. & Inst. Code, § 10850(a).)

The initial abuse reports required by Penal Code section 11166 are also confidential, as is the identity of the reporter. Disclosure of these reports is strictly limited to

persons or agencies whose interests are in protecting the child. (Pen. Code, §§ 11167(c), 11167.5.)

In addition, California extends protection by statute to confidential communications between doctor-patient (Evid. Code, § 992), psychotherapist-patient (Evid. Code, § 1014), mental health counselor-minor (Evid. Code, § 1014.5), and sexual assault counselor-victim (Evid. Code, § 1035.8)

Moreover, California's statutory scheme sets forth procedural protections when the defense seeks disclosure of privileged information. Evidence Code section 1040 sets forth the means by which a public entity may assert a claim of confidentiality or governmental privilege. (Pitchess v. Superior Court, 11 Cal.3d 531, 538

(1974).) This section establishes two different privileges: an absolute privilege in which disclosure is forbidden by an act of Congress or a state statute (Evid. Code, § 1040(b)(1)), and a conditional privilege in which disclosure "is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interests of justice." (Evid. Code, § 1040, subd. (b)(2); People v. Superior Court, 19 Cal.App.3d 522, 526 (1971).)

When a court is ruling on a claim of privilege under Evidence Code section 1040 and is unable to resolve the matter without requiring disclosure of the information claimed to be privileged, the court may require

disclosure of the alleged privileged information in an in camera hearing. (Evid. Code, § 915(b).)

The decision whether or not to employ this procedure is committed to the sound discretion of the trial court. (Johnson v. Winter, 127 Cal.App.3d 435, 440 (1982).) However, the burden of demonstrating the need for confidentiality rests on the agency claiming the privilege. (Ibid.; In re Muszalski, 52 Cal.App.3d 475, 483 (1975).) If an in camera hearing is the only means available to the agency to meet its burden, it is an abuse of discretion not to hold such a hearing and segregate the privileged from the non-privileged material. (Johnson, supra, at p. 440; Muszalski, supra, at p. 483.)

B. Unrestricted Disclosure Of Confidential Records Will Impair The States' Ability To Protect Children And Will Violate The Child's Right Of Privacy.

The confidentiality provisions of California's child abuse statutes protect two categories of interests: societal interests and individual interests. The societal interests in protecting children from crime devolve upon the government's three-fold ability to prevent and investigate crime and to rehabilitate the child. These three goals can only be achieved by encouraging the free flow of information without fear of disclosure. Also at stake are the individual privacy interests of the child which are inherent in the

numerous confidential relationships which are probed and revealed in the CWS files.

Relying on Davis v. Alaska, 415 U.S. 308 (1974), the Pennsylvania Supreme Court in Commonwealth v. Ritchie, supra, ruled that Mr. Ritchie's Sixth Amendment rights compelled disclosure of presumptively privileged CWS records without the protection of a judicial in camera hearing. Amici submit that Davis does not require such broad access to privileged information.

In Davis v. Alaska, supra, this Court held that a defendant's Sixth Amendment right to confrontation required that defense counsel be allowed to impeach the credibility of the prosecution's key witness by showing the witness had a juvenile

record and was therefore potentially biased.

The defendant in Davis was on trial for burglary. The prosecution's eye witness, Richard Green, was a 17 year old who had a juvenile record of burglary. Defense counsel sought to impeach Green by introducing evidence of his juvenile and probationary record, not to impeach his credibility generally, but to show his bias and motive to lie. The prosecution obtained a protective order to prevent counsel from bringing even the fact of Green's juvenile record before the jury.

This Court conducted a careful balancing in Davis, and concluded that by limiting the scope of cross-examination of Green, the jury was prevented from judging the accuracy

and truthfulness of his testimony. The state's policy of protecting juvenile offenders must give way under these circumstances. Whatever temporary embarrassment might result to the offender is outweighed by a defendant's right to probe into the influence of possible bias on cross-examination of a crucial witness.

The case before this Court is clearly distinguishable. First, the degree of intrusion permitted by Davis does not begin to approach that sought by respondent Ritchie herein: Davis merely allows disclosure of the fact of a juvenile adjudication, whereas Ritchie seeks unrestricted access to the entire CWS file. Second, the state's interests in Davis were less compelling than those asserted by amici herein. The states' interests favoring

confidentiality of juvenile records are based on notions of fairness to the juvenile in avoiding the stigma of criminality and assisting in rehabilitation. (Davis v. Alaska, supra, 415 U.S. 308.) These concerns are even more compelling in the case at bench where the child being protected is the victim of the crime.

The relative social utility of privileged information can be measured by the importance the community attaches to the relationship and the damage that disclosure would inflict on that relationship. (30 Stanford Law Rev. 935, 941-942 (1978).)

Here, the states' interests in protecting the welfare of its children are clear and compelling (Prince v. Massachusetts, 321 U.S. 157 (1944); Wisconsin v. Yoder, 406 U.S.

205 (1972).[3]) In fact, this Court has stated "[t]here is no more worthy object of the public's concern." (Wyman v. James, 400 U.S. 309 (1971).) In the 1982 funding for the Office of Child Abuse Prevention (Stats. 1982, Ch. 1398, § 1, p. 1134), the California Legislature made similar findings and declarations:

> "(a) Children are a precious resource in this county and in this state.
>
> "(b) Persons abused and neglected as children are

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3. This Court has noted that removal of parental rights is a penalty as great as, if not greater than, a criminal penalty. Nevertheless, the state's interest in preserving and promoting the welfare of the child may warrant severance of that relationship. (Lassiter v. Department of Social Services, 452 U.S. 18 (1981).)

> prone to commit violent crimes as adults.
>
> "(c) Child abuse and neglect prevention programs help protect children, stabilize families, and contribute to the reduction of crimes."

The California Legislature has repeatedly demonstrated its concern for victims by adopting programs to compensate victims (Gov. Code, §§ 13959-13964, 29632-29636) and render their contacts with the criminal justice system less painful. (Pen. Code, §§ 13835-13846; Barela v. Superior Court, supra, 30 Cal.3d 244, 253.)[4/]

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4. California Penal Code section 288, subdivision (c), requires the court, in any prosecution for lewd and lascivious acts with a child under the age of 14, to "consider the needs of the child victim and . . . do whatever is necessary and constitutionally permissible to prevent psychological harm to the child victim."

The reporting laws embody the strong public policy encouraging prompt investigation and prosecution of child abuse. (People v. Stritzinger, supra, 34 Cal.3d 505; Barela v. Superior Court, supra, 30 Cal.3d 244.) "The state has repeatedly emphasized that its citizens have a duty to protect children from abuse." (Id. at p. 254.) However, this duty is dependent upon the individual citizen's willingness to report abuse. Confidentiality assures the reporter's protection from reprisals and encourages him to perform his duty. (Riviaro v. United States, 353 U.S. 53 (1957).) The threat of disclosure will only have a chilling effect on the flow of this information.

Moreover, the rehabilitation of the child depends upon the confidentiality of child abuse reports and CWS

files. In-depth probing by CWS workers is necessary to assess and aid the child toward rehabilitation (DSS - Manual - SS - Div 30, Regs. 276, 376, 476). The child, in turn, must feel free to express his innermost feelings to the worker without fear of reprisal from his abuser or family. In addition, the confidentiality of CWS files provides protection from public exposure and prevents embarrassment to the victim. Disclosure of CWS files must therefore be limited to ensure the flow of this information.

The mental health of a society is dependent on the mental health of its children. Society therefore has a compelling interest in protecting its children and encouraging the identification of child abuse and the rehabilitation of the child. These

goals cannot take place if the child feels constrained in communicating with the CWS worker or any of the other professionals who assist in the protection and rehabilitation process. Likewise, disclosure of the reporter's identity will only inhibit prompt reporting.

Unrestricted disclosure of CWS files also violates the privacy rights of the child and his family. While some view communication privileges as exclusionary, truth restricting devices, a more positive view is offered by Professor Louisell who "stresses instead that privileges are vital protections of honor, conscience and privacy, and that their exclusionary effect 'is merely a secondary and coincidental feature of the privilege's vitality.'" (Louisell,

Confidentiality, Conformity and Confusion: Privileges in Federal Courts Today, 31 Tul.L.Rev. 101 (1956); Stan.L.Rev. supra, pp. 943-944.) This view requires greater attention to the potential injury to the particular privilege holder, especially where the privilege protects existing relationships which fall within the "zone of privacy."

The constitutional right of privacy which emanates from the penumbra of the Bill of Rights under the First, Ninth, and Fourteenth Amendments (Griswold v. Connecticut, 381 U.S. 479 (1965)) protects "the individual interest in avoiding disclosure of personal matters." (Whalen v. Roe, 429 U.S. 589, 599 (1977).)

This Court has recognized liberty interests in matters of family life and family relationships (Prince v. Massachusetts, 321 U.S. 158, 166 (1944)); (Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); (Santosky, et al. v. Kramer (1982) 455 U.S. 745); (Stanley v. Illinois, 405 U.S. 645 (1972)) as well as the fundamental right to satisfy intellectual and emotional needs in the privacy of one's home (United States v. Twelve 200-Ft. Reels of Super 8MM Film, 413 U.S. 123, 127 (1973)).

This Court has also extended the right of privacy to a fundamental relationship outside the family, where it concerned fundamental personal matters, namely, the doctor-patient relationship (Griswold v. Connecticut,

supra, 381 U.S. 479; Roe v. Wade, 410 U.S. 113 (1973)). Other courts have recognized a conditional right of privacy in the psychotherapist-patient (United States v. Lindstrom, 698 F.2d 1154 (8th Cir. 1983); Caesar v. Mountanos, 542 F.2d 1064 (1976).)

The People of the State of California have expressly retained the right of privacy (Art. I, § 1 of the Calif. Const.), which was intended to expand the privacy rights already in existence. (Board of Medical Quality Assurance v. Gherardini, 93 Cal.App.3d 669 (1979).) One of the four "mischiefs" this constitutional provision was directed at was "the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to a

third party." (White v. Davis, 13 Cal.3d 757, 775 (1975).)

Accordingly, California's right of privacy has been found to exist [under the California constitutional provision] in the doctor-patient relationship (Board of Medical Quality Assurance v. Gherardini, supra), the psychotherapist-patient relationship (In re Lifschutz, 2 Cal.3d 415, 431-432 (1970); McKirdy v. Superior Court, 138 Cal.App.3d 12 (1982)), between students and teachers during classroom discussion (White v. Davis, 13 Cal.3d 757) (1975)), and in marital communications (North v. Superior Court, 8 Cal.3d 301 (1972)).

CWS files contain "personal matter" (Whalen v. Roe, supra, 429 U.S. 589) which falls within the "zone of

privacy." The records contain information pertaining to the victim's social, medical and psychological life, as well as sensitive and private material from and about other members of the victim's family. Communications between the victim and the CWS worker, like the psychologist, will involve intimate matters on these subjects.

Consequently, the information within these files may involve matters which are far more personal than those shared between doctor and patient. The doctor-patient relationship generally involves concerns of the body. The psychotherapist-patient and CWS worker-child relationships, however, involve the individual's most personal thoughts and feelings. Moreover, most of this information may have no bearing on the victim's ability and tendency to recall

and tell the truth. (Accord, Caesar v. Mountanos, supra, 542 F.2d 1064; State v. Storlazzi, 464 A.2d 929 (Conn. 1983)); People v. District Court, 719 P.2d 722 (Colo. 1986).)

The information in CWS files was not compiled with a view towards law enforcement, but rather for the welfare of the child victim. The state has offered the child a helping hand, but not before it has probed into the very core of the child's private life and that of its family. To disclose this information to the accused abuser -- the very person from whom the state is intending to offer protection -- is to authorize a second and highly damaging assault on the child. Disclosure forces the child to choose between his rights of privacy and his right as a citizen and victim to

testify and have his abuser brought to justice. (People v. District Court, supra, 719 F.2d 722.)

Therefore, any disclosure of CWS files must be limited to only that information which is absolutely necessary to a fair assessment of the truth. Disclosure must also be limited to the parties and the purpose for which it was ordered.

II

THE SIXTH AMENDMENT RIGHTS OF CONFRONTATION AND COMPULSORY PROCESS DO NOT REQUIRE DISCLOSURE OF PRIVILEGED INFORMATION WITHOUT AN INITIAL SHOWING OF MATERIALITY, AN IN CAMERA HEARING, AND A BALANCING OF INTERESTS.

In the case before this Court, defense counsel for respondent Ritchie unsuccessfully sought pre-trial access to Child Welfare Services (CWS) records on the basis that:

> "There could be possible defense witnesses disclosed . . . there could be matters in [the child welfare services file] that would be favorable to the defendant." (Commonwealth v. Ritchie, supra, 502 A.2d 148, 154.)

On appeal, defense counsel argued that he should be granted access to the records for the narrow purpose of arguing relevance and materiality. (Commonwealth v. Ritchie, supra, at p. 149.) The majority of the Pennsylvania Supreme Court agreed, based on a fear that Ritchie's Sixth Amendment rights would be "diluted" unless defense counsel personally inspected the confidential files. The court reasoned that "review with the eyes and the perspective of an advocate" is required by the Sixth Amendment. Accordingly, the court failed to balance the competing interests and dispensed with the

necessity of a judicial in camera examination of the privileged material.

The position taken by the Pennsylvania Supreme Court is not supported by constitutional case law and if upheld would have a devastating effect on the government's ability to encourage and protect confidential communications of any kind.

A defendant's Sixth Amendment rights to compulsory process and confrontation are not absolute. (Washington v. Texas, 388 U.S. 14 (1967).) For example, these rights are qualified to the extent of existing testimonial privileges. (Id., p. 23, n. 21; United States v. Nixon, 418 U.S. 683, 709-710 (1974); Ohio v. Roberts, 448 U.S. 683 (1974).)

As this Court [has] recently stated in Delaware v. Fensterer, ____ U.S. ____, 106 S.Ct. 292 (1985), per curium:

> "'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.' [Davis v. Alaska, 415 U.S. 308, 94 S.Ct.1105, 39 L.Ed.2d 347 (1974) at 315-316 [94 S.Ct. at 1109-1110] (quoting 5 J. Wigmore, Evidence, § 1395, p. 123 (3d ed. 1940) (emphasis in original)). Generally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish . . . . This conclusion is confirmed by the fact that the assurances of reliability our cases have found in the right of cross-examination are fully satisfied in cases such as this one . . . : the factfinder can observe the witness' demeanor under cross-examination, and the witness is testifying under oath and in the presence of the accused.'"

In situations where two competing interests exist, this Court has previously weighed the competing interests in order to preserve the essential integrity of both (Davis v. Alaska, supra, 415 U.S. 308; United States v. Nixon, supra, 418 U.S. 638, 711-712; McCray v. Illinois, 386 U.S. 300 (1967); Prince v. Massachusetts, supra, 321 U.S. 158).

In the instant case, the criminal defendant's right of access should be weighed against the state's interest in preventing and treating child abuse. In deciding whether access should be granted, a careful balance must take place which will "depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of

the [information sought], and other relevant factors." (McCray v. Illinois, 386 U.S. at 310, quoting Roviaro v. United States, 353 U.S. 53, 61 (1957).)

There is no fixed rule, and the problem calls for balancing the public interest against the individual's right to prepare his defense. (Roviaro v. United States, supra, 353 U.S. at 62.) The information sought must be relevant and helpful to the defense or essential to a fair determination of the cause in order to override the need for confidentiality. (Id. at 60-61.)

Moreover, the defense should be required to meet a high standard of evidentiary need in order to prevent "fishing expeditions" into privileged matters. The government has no

obligation to provide access to witnesses who possess no evidence material to guilt or innocence. (United States v. Valenzuela-Bernal, supra, 458 U.S. 858.)

The defendant must make some plausible showing that the information sought is both favorable to the defense and material to guilt in ways which are not merely cumulative. (Id., at pp. 867, 873; Washington v. Texas, 388 U.S. 14 (1967); Brady v. Maryland, 373 U.S. 83 (1963); United States v. Lindstrom, 698 F.2d 1154 (8th Cir. 1983); Camitsch v. Risley, supra, 705 F.2d 351.)

The information is material where it might affect the outcome of the trial (Moore v. Illinois, 408 U.S. 786 (1972); United States v. Agurs, 427 U.S. 97 (1976)), or reveals possible bias, prejudice, motive to lie or

inability to perceive and recount the truth. (Davis v. Alaska, supra, 415 U.S. 308.) In the instant case Mr. Ritchie failed to meet the above test. His claim was based on vague and speculative assertions of what "could be."

If, after balancing the competing interests and assessing the defendant's need, the court concludes disclosure may be proper, the court should then examine the privileged information in camera to determine what specific documents, if any, satisfy the requirements of relevance and materiality. In so doing, the court should take care to limit disclosure to only that which is absolutely necessary to a fair assessment of the truth.

This Court has approved the use of in camera procedures where the

materials sought are confidential. (United States v. Reynolds, 345 U.S. 1 (1953); United States v. Nixon, supra, 418 U.S. 683; New York Times Co. v. Jascalevich, 439 U.S. 1317 (1978); Camitsch v. Risley, 705 F.2d 351 (9th Cir. 1983).)

An in camera hearing is essential to the preservation of confidentiality. Disclosure to defense counsel even for the limited purpose of arguing relevance would compromise the confidential interests involved.

The Sixth Amendment only requires disclosure of information that is material and relevant. (United States v. Valenzuela-Bernal, 458 U.S. 858 (1982).) Disclosure of the entire file to defense counsel would give him/her access to all of the privileged material, most of which will have no

bearing on the case. This would be nothing more than an opportunity to engage in a "fishing expedition."

This Court has never construed the Sixth Amendment to require such broad intrusions into private matters. The disclosure of the fact of a juvenile adjudication (Davis v. Alaska, supra, 415 U.S. 308) does not compare with the disclosure of sensitive, informal information concerning fundamentally private matters. (Camitsch v. Risley, supra, 705 F.2d 351, 354.)

Moreover, defense counsel's preliminary access to the privileged information places him in an untenable position. On one hand, as an officer of the court (Cohen v. Hurley, 366 U.S. 117 (1961)) he is charged with the obligation of obeying any restrictive

orders of the court (Prof. Rules of Ethics, Bus. & Prof. Code, § 6103.) 5/ On the other hand, counsel takes an oath to represent his client to the best of his knowledge and ability. (Bus. & Prof. Code, § 6067.)

If counsel is given unrestricted access to privileged information, he will be faced with having information which the court will not permit him to use for his client's benefit, even though he knows that the information could provide a useful source of harassment, intimidation and embarrassment to the witness.

Moreover, if relevance cannot truly be assessed without "the eyes of an advocate," the advocate may often times need to consult with his client

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5. The court would presumably take steps to insure improper dissemination of the privileged matter.

in order to fully assess the relevance of certain information. Disclosure at this level would then defeat the very purpose of the privilege.

Information, such as the reporter's identity and the child's new address where he/she has been removed under emergency conditions, will be included in the social service files. Unrestricted disclosure of this information may place these individuals in danger of reprisal without cause.

An in camera hearing would allow the trial court to make a finely tuned case-by-case comparison of the relative weights of the competing interests. Fundamental social policy decisions as to which relationships are to be privileged fall within the special capacity of the legislature. The task and talent of the trial courts

lie in assessing the potential harm disclosure would impose on a particular witness whom the judge can examine. (30 Stan. L. Rev., supra.)

The trial court's analysis should therefore include an assessment of the defendant's specific need for the information in light of all the circumstances, balanced against the general importance of the privilege claimed, the particular privacy interests involved, and the harm of disclosure. Judicial in camera inspection of the privileged information as well as in camera defense argument will serve to protect both sides.

If, after an in camera hearing, the court allows disclosure, it should take steps to prevent further dissemination of the information.

Protective orders may be fashioned directing that the information only be disclosed in connection with the criminal proceedings and that the records produced for in camera inspection be sealed for appellate review.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the decision of the Pennsylvania Supreme Court should be reversed.

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(9)

IN THE

Supreme Court of the United States

October Term, 1985

No. 85-1347

Commonwealth of Pennsylvania,

Petitioner,

vs.

George F. Ritchie,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF, AMICI CURIAE, AND BRIEF, AMICI CURIAE, OF THE SUNNY VON BÜLOW NATIONAL VICTIM ADVOCACY CENTER, INC. JOINED BY THE NEW YORK STATE CRIME VICTIMS BOARD, THE LEGAL FOUNDATION OF AMERICA, INC. AND THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, INC. IN SUPPORT OF THE PETITIONER.

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MOTION FOR LEAVE TO FILE AMICI CURIAE

Come now The Sunny von Bülow National Victim Advocacy Center, Inc., et al, and respectfully move this Court for leave to file and join the attached brief, amici curiae, in support of the Petitioner, and declare as follows:

1. Identity and Interest of Amici Curiae:

THE SUNNY VON BULOW NATIONAL VICTIM ADVOCACY CENTER, INC., is a national, not-for-profit organization, the purposes of which are to promote responsiveness of the judicial system to the rights and needs of the victims of violent crime and to implement programs to heighten America's consciousness concerning the plight of victims.

The NEW YOUR STATE CRIME VICTIMS BOARD is an agency of the State of New York, established in 1966 to financially compensate crime victims and their families. In 1979, the Board was given additional authority to advocate for the rights and interests of crime victims.

THE LEGAL FOUNDATION OF AMERICA is a nonprofit corporation supporting the operations of a public interest law firm. Among

other goals, it seeks to preserve a national criminal justice system in which adjudications of guilt are reliable rather than haphazard.

THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, INC. is a national, nonprofit organization founded to improve legal protection for children. The purpose of the National Association of Counsel for Children is to provide training and information to child advocates and to establish a strong foundation of member practitioners from various professions who work with children affected by legal proceedings.

2. Desirability of a Brief Amici Curiae.

The instant case is one in which the interests of victims of crime, specifically children who have been sexually abused, are directly involved. Amici represent: 1) a national victim advocacy organization in the private sector; 2) a state victims advocacy organization; 3) a national organization concerned with constitutional issues in criminal law; and, 4) a national organization for children which was founded to improve legal protection for children. Amici possess knowledge, of an empirical nature, about the potential impact of this Court's decision on the rights of child sexual abuse victims which they wish to share with this Court.

3. Reasons for Believing That Existing Briefs May Not Present All Issues, and Avoidance of Duplication.

Amici will discuss, in this brief, national, policy-related issues relating to the impact of this Court's decision in the instant case. Counsel for Amici have consulted with Counsel for Petitioner in an effort to aviod unnecessary duplication and believe that their policy arguments will present issues that are not otherwise raised.

4. Consent of Parties.

Counsel for Petitioner has consented to this filing; Counsel for Respondent has advised that he will neither consent nor object to this filing..Letters to this effect have been lodged with the Clerk of this Court.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

BRIEF AMICI CURIAE, IN SUPPORT OF PETITIONER, OF THE SUNNY VON BÜLOW NATIONAL VICTIM ADVOCACY CENTER, INC. JOINED BY THE NEW YORK STATE CRIME VICTIMS BOARD, THE LEGAL FOUNDATION OF AMERICA, INC. AND THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, INC.

INTEREST OF AMICI CURIAE

The interest of Amici Curiae, together with their reasons for desirability of filing this brief and statement of avoidance of duplication have been set forth in the attached Motion for Leave to File a Brief Amici Curiae.

ARGUMENT

IMPORTANT POLICY CONSIDERATIONS DICTATE THAT THE CONFIDENTIALITY OF RECORDS IN CHILD ABUSE CASES SHOULD BE PRESERVED.

A. THE "CONFRONTATION CLAUSE" OF THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT MANDATE, IN CHILD ABUSE CASES, A "RIGHT TO RUMMAGE" IN OTHERWISE-PRIVLEGED FILES PERTAINING TO SUCH CASES.

This Court, in Davis v. Alaska, 415 U.S. 308 (1974), enunciated a carefully-reasoned balancing test involving the defendant's Sixth Amendment right of confrontation of witnesses against him, on the one hand, and the rights of society and the victims of crime on the other hand. The Supreme Court of Pennsylvania, in the instant case, misinterpreted this balancing test, holding that the Commonwealth's interest in maintaining the statutorily-mandated[1] confidentiality of child abuse records could not override a defendant's right to confront and cross examine witnesses against him.

As Justice Larsen noted in his dissenting opinion in the instant case, the majority weighed the "careful balance" of Davis v. Alaska, supra, "...heavily in favor of the defendant..."[2] Amici submit that the majority weighed the balance far too heavily in favor of the defendant. In effect, the majority created a novel Constitutional "right to rummage" through all otherwise-confidential Child Welfare Services' records, despite the fact that (a) the prosecution had made no use whatever of the files in question; and, (b) defense counsel's request to review these files was in no way particularized but, rather, was based on conclusory representations that there "could be" material helpful to the defendant in such files.

During its October, 1985 Term, this Court cautioned against the creation of new, fundamental constitutional rights where there was no support for such innovation in law or in legislative history. Albeit in another context, that of the "right" of individuals to engage in private homosexual acts, this Court in Bowers v. Hardwick, ____U.S.____, 39 Cr. L. 3261 (1986), stated:

1. Pennsylvania Stat., Act. 1975, November 26, P.L. 438, No. 124, Sec. 15.
2. 502 A. 2d 148 (1985), dissenting opinion, Slip. op., at 14a.

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights embedded in the Due Process clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made Constitutional law having little or no cognizable roots in the language or design of the Constitution.

____ U.S.____, 39 Cr. L., at 3263.

As Petitioner has pointed out in its Petition for Certiorari, the clear and announced legislative purpose of Pennsylvania's Child Protective Services Law was to "...encourage more complete reporting of suspected child abuse".[3] Additionally, this Court recently made it clear that rights under the Confrontation Clause of the Sixth Amendment to the Constitution of the United States were not absolute. In Delaware v. Van Arsdall, ____ U.S. ____, 39 Cr. L. 3007 (1986), the Court held that the denial of a defendant's opportunity to impeach a witness for bias, in violation of the Sixth Amendments's Confrontation Clause, is subject to harmless error analysis under Chapman v. California, 386 U.S. 18 (1967). The Court noted: "As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one"..____ U.S., at ____, 39 Cr. L., at 3009[4].

Similarly, in U.S. v. Bagley, ____ U.S. ____, 106 S. Ct. 1215 (1985), the Court held that suppression of impeachment or other exculpatory evidence amounts to constitutional error only if such evidence is material in the sense that its suppression undermines confidence in the outcome of the trial. Other courts have reached similar conclusions in analogous situations,[5].

Given the two principles: 1) that courts should exercise "great resistance"[6] towards creating fundamental constitutional rights out of whole cloth; and, 2) that this Court and other courts have held that defendants' rights under the Sixth Amendment's Confrontation Clause are not absolute, then the countervailing public policy issues involving the right of the state to bring criminals to justice, and the rights of the victims of crimes, should be given more than usual consideration in the "balancing" of such rights against defendants' Confrontation Clause rights.

3. Petition for Certiorari of the Commonwealth of Pennsylvania in the instant case, at 17.
4. See also: Delaware v. Fensterer, ____ U.S. ____, 106 S. Ct. 292 (1985).
5. See, e.g.: Camsitch v. Risley, 705 F. 2nd 351 (9th Cir. 1983); People v. District Court, 719 P. 2d 222 (Colo. 1986); In re Robert H. 509 A. 2d 475 (Conn. 1986); State v. Storlozzi, 464 A. 2d 829 (Conn. 1983).
6. Bowers v. Hardwick, ____ U.S., at ____, 39 Cr. L., at 3263.

B. PUBLIC POLICY CONSIDERATIONS DICTATE THAT CONFIDENTIALITY OF FILES IN CHILD ABUSE CASES BE MAINTAINED.

There can be no real question that child sexual abuse is a major problem confronting this country today. The Child Welfare League of America reported in 1986[7] that, in 20 states surveyed, there were 35,014 reported cases of child abuse in 1983 and 55,965 cases of child sexual abuse reported in 1984, an increase in reporting of 59% in a one-year period.[8] One recent study of reported estimates of child sexual abuse instances notes estimates that range from 50,000 to one million per year[9] Significantly, for purposes of this brief, the same study states:

> The American Humane Association's national survey of state statistics on child protection shows a 200 percent increase in reports of sexual abuse since 1967, although it has been widely suggested that much of this increase is due to increased willingness to report episodes rather than to actual changes in behavior. (Emphasis supplied.)

All 50 states now have child abuse reporting laws.[10] As would be supposed, numbers of cases reported have significantly increased since mandatory and voluntary child abuse reporting laws have been enacted. For example, the Final Report of Attorney General (of the State of California), John K. Van de Kamp's Commission on the Enforcement of Child Abuse Laws (April, 1985), notes that after California's Child Abuse Reporting Law (Penal Code Sections 11165 through 11174), went into effect January 1, 1981, the numbers of reports of child abuse rose from 25,000 in 1981 to 42,500 in 1983. (Report, at 1-3).

As is true of the Pennsylvania statute at issue in the instant case, the confidentiality of those reporting child abuse in California is strictly protected. A report, Child Abuse Prevention Handbook, published in a revised edition by the California Attorney General's office notes:

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7. Too Young to Run: The Status of Child Abuse in America, Child Welfare League of America, 4400 First St., N.W. Washington, D.C. 20001 (1986).
8. Id, at 9. See also: Rust, "The Nightmare is Real", 14 Student Lawyer, 13, Law Student Division, American Bar Association (April 1986).
9. Eve, Empirical and Theoretical Findings Concerning Child and Adolescent Sexual abuse: Implications for the Next Generation of Studies, VICTIMOLOGY: AN INTERNATIONAL JOURNAL, Vol. 10, at 97 (1985).
10. Weisberg and Wald, Confidentiality Laws and State Efforts to Protect Abused for Neglected Children, 18 Fam. L.Q. 143 (1984), at 144.

ACCESS TO REPORTS OF SUSPECTED CHILD ABUSE

Confidentiality regarding the identity of the reporters, the reports, and the records maintained by protective agencies and the Department of Justice Child Abuse Central Registry is strictly controlled.

IDENTITY OF REPORTERS
(Pen. Code, & 11167, subd. (c))

The identity of all persons who report known or suspected child abuse is confidential and may only be disclosed at follows:

- Between child protective agencies
- To counsel representing a child protective agency
- To the district attorney in a criminal prosecution
- To the district attorney in an action initiated under Welfare and Institutions Code section 602 (wards; minors violating laws defining crime) arising from alleged child abuse.
- To the child's counsel appointed pursuant to Welfare and Institutions Code section 318
- To the county counsel or district attorney in an action initiated under Civil Code section 232 (termination of rights) parental or Welfare and Institutions Code section 300 dependent children)
- By court order
- When the reporter waives confidentiality[11]

The necessity of confidentiality of reporters in child abuse cases, including, of course, child sexual abuse cases, is elaborated upon in this Handbook:

THE ROLE OF THE COMMUNITY

> Community members have an important role in protecting children from abuse and neglect. Individuals must recognize that child abuse is a community or neighborhood problem which can be prevented if we involve ourselves through various types of individual, neighborhood, or community action.
>
> The life of a child may be saved if community members become involved and report cases of suspected child abuse. Fear of involvement has resulted in violent family tragedies in which the neighbors reported that they knew what was going on but declined to get involved.

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11. Child Abuse Prevention Handbook, Office of the Attorney General, Suite 383, P.O. Box 944255, Sacramento, CA 94424-2550 (August, 1985), at 63.

Involvement does not mean physical intervention or snooping on your neighbor -it simply means not ignoring the obvious. If maltreatment of a child is suspected, a report should be made so that a qualified and experienced person can investigate the situation. The child protective agencies to report suspected child abuse include:

- The police or county sheriff's department.
- The county child welfare department (other names for this may be children's services department, department of public social services, etc.).
- The county juvenile probation department.

If a member of the community, who is not required by law to report, feels reluctant to identify himself or herself by name, it should be noted that reports may be made to the above agencies anonymously. (Pen Code, #11167, subd. (c).) For purposes of investigation and follow-up, however, it is preferred that the name and address of such a reporter be volunteered. The important thing is the immediate protection of the child. In any event, all names are confidential and can be released only by a court order to designated persons regardless of whether the reporter is one required by law to report.

> For example, when the parents of an abused child ask for the name of the individual who reported them, the child protective agency will not release the name of the reporting person. Only a court can order such disclosure and will do so only under certain circumstances. Mandated reporters must give their names to a child protective agency when reporting. However, all reporters are protected by the cloak of confidentiality described above.[12]

California statutes also provide for absolute immunity from criminal or civil liability for reports made by mandated reporters and for such immunity of other persons reporting known or suspected child abuse unless the report was knowingly false.[13]

The importance of confidentiality in child abuse reporting laws cannot be exaggerated. As the Child Abuse Prevention Handbook notes, reluctance to "become involved" and fear of retaliation, may well prevent persons from making reports of child abuse, and without the assurances of confidentiality that are contained in statutes such as those of Pennsylvania, California and

12. id, at 32, 33.
13. Cal. Penal Law, Sec. 11172 (1981)

other states,[14] it is probable, indeed, highly likely, that many fewer child sexual abuse cases would be reported.

An analogy may be made between this Court's teachings in cases involving the confidentiality of the identities of imformants in narcotics cases. Balancing the interests of society in being able to penetrate such secretive crimes as narcotics transactions, and in avoiding retaliation against informants, against the defendant's Sixth Amendment confrontation right, this Court has held that the public interest mandates that the identity of informants in narcotics cases shall not be routinely divulged, McCray v. Illinois, 386 U.S. 10 (1967); Roviaro v. United States, 353 U.S. 53 (1957), unless the defendant has made a prima facie showing that probable cause for a search warrant was based on a knowingly false statement in the affidavit, Franks v. Delaware, 438 U.S. 154 (1978).

Amici suggest that the secretive nature of the crimes involved in narcotics cases is even more pronounced in child sexual abuse cases. In the former class of cases, the participants in the crime, buyers and sellers, are at least on a relatively equal footing. In child sexual abuse cases, there is an unequal power relationship between the abuser and the abused. It has been noted that:

> Sexual abuse is defined as interaction between a child and a more mature person (adolescent or adult) that involves manual, oral, or genital fondling or touching of either person's genitals. It is assumed that there is a combination of unequal power, sexual activity, and usually or eventually, fear. In addition the behavior is secret. Further, such involvement "sexualizes" the child which, in psychological terms, means that the child has experienced premature sexual awareness which because it is developmentally inappropriate, results in additional trauma to the child.

14. See, generally, Weisburg and Wald, Confidentiality Laws and State Efforts to Protect Abused or Neglected Children, 18 Fam. L.Q. 143 (1984), see ft. 10, supra. This article is concerned primarily with the issue of confidentiality between child abuse victims. The article concludes with the highly significant conclusions that:

> Child abuse and neglect laws, abetted by mandatory reporting laws, have been designed to give the state the information it needs to protect children from harm, but these laws are often insufficient, especially because they bump against confidentiality laws in a complex set of statutory permutations which seem more the result of legislative inadvertence than design. The ill-coordinated relationship among these sets of laws tends to manifest itself in the confusion of professionals who lament that they cannot determine their legal duties and rights when they have confidential information about their patients which might bear on charges of child abuse or neglect. But of course the most serious consequence of this confusion may be preventable harm to children. (Emphasis supplied.)

At 211.

> Most traumatic, however, is sexual abuse in cases where the victim and abuser are known to each other in a caretaking relationship. In this situation, the perpetrator of sexual abuse may be an adolescent or adult designated to be in a parental role and may include, in addition to the immediate biological family: extended family, stepparents, babysitters, day-care workers, teachers, youth group leaders, and any other adolescent or adult in a caretaking role. The abuser is therefore in a role of caretaker and abuser. For a child, this is doubly harmful, since assaults or molestations by strangers do not present conflict for the child, enabling the child to identify the abuser and to describe the abuser, more readily. (Emphasis supplied.)[15]

This comment highlights both the "unequal power" of the abuser, the unrealistic "fear" on the part of the abused, and the "secret" nature of the illicit relationship. It is essential that children or other observers report such crimes in order to penetrate this combination of factors. Amici submit that withdrawing the protective nature of confidentiality would "chill" the inclinations of those having knowledge of child abuse, victim or observer, in a manner that society cannot tolerate if it wishes to ferret out instances of child abuse and to punish the observers.

CONCLUSION

The Sixth Amendment's Confrontation Clause, as interpreted by this Court, does not mandate the newly-discovered, constitutional "right to rummage" in the files involved in child abuse cases enunciated by the Supreme Court of Pennsylvania. Conversly, public policy does dictate that the confidentiality of those reporting instances of child abuse should be preserved if the protection of children from sexual abusers is to be effectively enforced. For these reasons the decision of the Supreme Court of Pennsylvania should be reserved.

Respectfully submitted,

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15. Rust, "The Nightmare is Real ". 14 Student Lawyer 13, (1986), at 16, op. cit. supra, note 8.

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No. 85-1347

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

GEORGE F. RITCHIE,
Respondent.

On Writ Of Certiorari To The Supreme Court of Pennsylvania.

BRIEF OF AMICUS CURIAE IN SUPPORT OF JUDGMENT BELOW

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QUESTIONS PRESENTED

1. Is the decision of the Supreme Court of Pennsylvania in the case *sub judice* a "Final Judgment" within the meaning of 28 U.S.C. § 1257?

2. Whether the Confrontation and Compulsory Process Clauses of the Sixth Amendment to the United States Constitution require the limited disclosure of confidential child protective service records to defense counsel in a state rape-incest prosecution under the circumstances presented in this case?

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JURISDICTION

No federal jursidictional basis exists to review the December 11, 1985 decision of the Supreme Court of Pennsylvania, *Commonwealth* v. *Ritchie*, ___ Pa. ___, 502 A.2d 148 (1985), on certiorari, since the Pennsylvania decision is not a "final judgment" within the meaning of 28 U.S.C. § 1257. Therefore, the writ of certiorari should be dismissed as improvidently granted.

STATEMENT OF THE CASE

The Respondent submits the record discloses the following facts, which are material to the determination of this cause, in addition to the material disclosed in the Petitioner's Statement of the Case.

Prior to the first trial on October 23, 1979, a pre-trial conference was conducted in chambers between counsel and the trial judge to discuss the refusal of representatives from Allegheny County's Child Welfare Service (C.W.S.) to honor a subpoena *duces tecum* for the production of records compiled on the complaining witness to these charges of sexual abuse. The attorney for C.W.S. argued that the confidential nature of the records precluded their discovery, citing the confidentiality provisions of the Pennsylvania Child Protective Services Law, 11 P.S. § 2215(a).

Defense counsel was able to point out that the thirteen year old prosecuting witness complained of sexual assaults, which she claimed occurred on a regular basis of two or three times a week for a period of three years, prior to the time criminal charges were filed. (J.A. 65a, 67a). The last such event, which led to the filing of the criminal charges in this case, occurred on June 11, 1979. Defense counsel disclosed that C.W.S. conducted an in-home evaluation in September of 1978 and the girl was referred to a physician for a physical examination. It is important to

note that *no* criminal charges arose from the investigation conducted by C.W.S. in September of 1978. Defense counsel also raised the possibility that the challenged records could disclose the names of witnesses, who were discovered by the C.W.S. investigation and were unknown to the defense. (J.A. 65a-66a, 69a). The trial court denied the discovery request and closed the in-chambers conference by stating: "We didn't read 50 pages or more of an extensive record. We have asked for the medical records. There are no medical records that the court reviewed, and that is what we were told." (J.A. 72a).

At trial, the prosecution sought to establish the guilt of the accused on these criminal charges solely through the testimony of the thirteen year old witness. As is most often the circumstance found in criminal cases of this nature, the young girl was the only witness presented by the Commonwealth to provide direct evidence of the criminal episode. (J.A. 5a-61a). Other witnesses were called merely to establish that the complaining witness had disclosed these matters to them several weeks after the last criminal episode on June 11, 1979. The complainant testified that these criminal episodes supposedly occurred on a regular basis of three or four times a week for a period of approximately four years prior to June 11, 1979. (J.A. 15a).

During cross-examination, the witness admitted that a representative from C.W.S. had visited the Ritchie home in September of 1978, when she and the other children in the home were interviewed and she was taken for an examination to a physician as a result of this investigation. (J.A. 47a, 48a, 49a, 50a, 68a). The witness admitted that she did not disclose either to the C.W.S. representative or to the doctor in September, 1978, the fact that these episodes of sexual abuse were supposedly occurring on a

regular basis during this period of time. C.W.S. apparently took no further action until June, 1979.

After reviewing the entire record, the Supreme Court of Pennsylvania decided that the interest of Pennsylvania in maintaining the confidentiality of the C.W.S. files does not prevail against the right claimed by the defense in this case for an opportunity for effective confrontation and compulsory process under the Sixth Amendment to the Constitution of the United States. As a remedy, the Supreme Court of Pennsylvania remanded the matter to the trial court with instructions to enable defense counsel to have access to the C.W.S. files, in order to then argue to the trial court "what use, if any, could have been made of the files in cross-examining the complainant or in presenting other evidence." (Pet. for Cert. 12a-13a). The Commonwealth could then argue that the error, if any, was harmless beyond a reasonable doubt.

SUMMARY OF THE ARGUMENT

The decision of the Supreme Court of Pennsylvania in the case *sub judice* is not a "final judgment" for review upon a writ of certiorari within the meaning of 28 U.S.C. § 1257. This decision has not terminated the litigation between the parties so that nothing remains to be done but to perform the "ministerial act" contemplated by *Mower* v. *Fletcher*, 114 U.S. 127 (1885). The trial court must conduct an *in camera* hearing to determine whether the C.W.S. material is relevant to the defense; to determine whether the suppression of the material was harmless; and, if necessary, to proceed with a new trial. The Sixth Amendment issue may become moot if the trial judge determines that nothing in the file is relevant to the criminal charges.

Further, this decision fails to come within any of the four categories of "finality" found in *Cox Broadcasting*

Corporation v. *Cohn*, 420 U.S. 469 (1975), or in *National Socialist Party of America* v. *City of Skokie*, 432 U.S. 43 (1977). The proceedings in the trial court are more than merely "formal" in nature. The decision will only become "final" if the trial court finds the C.W.S. material relevant, finds that because of its suppression the defendant was denied his Sixth Amendment rights, and such suppression constituted error that was not harmless beyond a reasonable doubt necessitating a new trial. Then the issue becomes final for purposes of appeal to this Court.

This decision will not elude federal review, since Pennsylvania may continue to insist the Supreme Court of Pennsylvania erroneously decided the Sixth Amendment issue. However, this Court will then have the benefit of deciding the entire case, including the harmless error issue, without the possibility of deciding the issues piecemeal.

Finally, Pennsylvania is presenting a Sixth Amendment *issue*, but the State is not complaining about a Sixth Amendment *injury*. Pennsylvania is not complaining that its Highest Court abridged its Sixth Amendment rights by construing the Sixth Amendment too narrowly. Pennsylvania is complaining, though unannounced, that its Supreme Court abridged its residual Tenth Amendment rights by construing the Sixth Amendment claim of the defendant too broadly. The Tenth Amendment right of states to be free of excessive federal regulation is not the kind of "identifiable federal . . . constitutional policy" that this Court appears to of have in mind for "finality" purposes in *Cox*, supra. For this reason, the writ of certiorari should be dismissed as having been improvidently granted.

Alternatively, turning to the merits of the case, the Supreme Court of Pennsylvania has held in this case that

the Commonwealth's interest in maintaining the confidentiality of child protective service records may not override a defendant's right to have the opportunity to effectively confront and cross-examine the principle witness against him in a criminal prosecution. A state may not deny its confrontation obligations simply by alleging that the evidence it wishes to withhold is privileged under state law. *Davis* v. *Alaska*, 415 U.S. 308 (1974). Where a review of the *entire record* discloses that the prosecution seeks to establish the guilt of the accused on criminal charges through the testimony of a witness, who has given information to a social agency during the period of time the criminal episodes supposedly were occurring, the defendant is denied his rights under the Confrontation and Compulsory Process Clauses of the Sixth Amendment to the United States Constitution to deny his attorney access to such material. The suppression of such material is in derogation of the search for truth, which is the paramount function of a criminal trial. The very integrity of the judicial system and public confidence in that system depend upon full disclosure of all relevant facts to the cause. *United States* v. *Nixon*, 418 U.S. 683 (1974).

After a review of the *entire record*, the defense has shown *compelling reasons* to uphold the Sixth Amendment claim to access the privileged material and this Court should uphold the decision of the Supreme Court of Pennsylvania.

ARGUMENT

I. THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA IN THE CASE *SUB JUDICE* IS NOT A "FINAL JUDGMENT" WITHIN THE MEANING OF 28 U.S.C. § 1257.

The Supreme Court of Pennsylvania has held in this case that the interest of Pennsylvania in maintaining the

confidentiality of Child Welfare Service (CWS) files does not prevail against the right claimed by the defendant to effective confrontation and compulsory process under the Sixth Amendment to the Constitution of the United States. As a remedy, the Highest Court of Pennsylvania remanded the matter to the trial court with instructions to enable defense counsel to have access to the CWS files, in order to then argue to the trial court "what use, if any, could have been made of the files in cross-examining the complainant or in presenting other evidence." (Pet. for Cert. 12A-13A). The Commonwealth would then be able to argue that the error, if any, was harmless beyond a reasonable doubt. Such a decision does not present a "final judgment" for review by this Court. 28 U.S.C. § 1257.

The classic statement defining the term "finality" for Section 1257 purposes is that stated by Chief Justice Waite in *Mower* v. *Fletcher*, 114 U.S. 127, 128 (1885) as follows:

> [A state court judgment is final that] terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here [in the Supreme Court of the United States], the court below would have nothing to do but to execute the judgment it had already rendered. . . . Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered. . . . Nothing is left to the judicial discretion in the court below.

By this standard, the *Ritchie* judgment is interlocutory, because there are several things to do on remand: to conduct an *in camera* hearing to determine whether the CWS records are relevant to Ritchie's defense; to determine whether the suppression of this material was harmless; and, if necessary, to proceed with a new trial. For purposes of comparison to see how far the

Ritchie judgment is from being "final," one can contrast it with judgments that have been deemed "final." The interpretation of this Sixth Amendment claim by the Highest Court of Pennsylvania would become "final," if the prosecutor refuses on remand to disclose the CWS records and the trial judge holds him in contempt, compare *Ryan* v. *United States*, 402 U.S. 530 (1971) (a case under 28 U.S.C. § 1291); or if the prosecutor refuses on remand to disclose the records and the trial judge therefore dismisses the prosecution.

The *Ritchie* judgment not only fails to satisfy the *Mower* definition of "finality," it also threatens the policies that the finality requirement is designed to serve. This requirement serves several policies: (1) It expedites state court litigation by postponing all federal appeals until the end, rather than allowing state proceedings to be interrupted with piecemeal appeals. If this Court proceeds to hear this case on the merits and affirms, it will have delayed Ritchie's retrial by at least two years. (2) The requirement of finality avoids unnecessary federal litigation by causing the Supreme Court to abstain from reviewing federal issues that further state court proceedings may moot. For example, the Sixth Amendment issue in *Ritchie* may become moot if the trial judge determines upon remand that nothing in the CWS records is relevant; or if he determines the suppression of the material was harmless; or if the jury, on retrial, reconvicts. (3) Finality streamlines federal litigation by protecting the Supreme Court from having to hear federal issues piecemeal that, if postponed, can be heard all at once. Thus, *Ritchie* in fact presents two potential federal issues: (a) The Sixth Amendment issue the Supreme Court of Pennsylvania has already decided; and (b) the further Sixth Amendment question as to whether the suppression of the CWS records was harmless. If the Supreme Court delays

review until after the judgment below is final, it can hear both of these constitutional issues at one time, rather than having to consider them separately. See generally, C. Wright, A. Miller, E. Cooper, E. Gressman, *Federal Practice and Procedure*, Vol. 16, §§ 4008-10, plus Supplement.

This Court has further amplified the *Mower* definition of "finality." Four of the exceptions are set forth in *Cox Broadcasting Corporation* v. *Cohn*, 420 U.S. 469 (1975); another is found in *National Socialist Party of America* v. *City of Skokie*, 432 U.S. 43 (1977). The present case fails to qualify under any of these five exceptions.

In *Cox Broadcasting*, supra., this Court identified four categories of cases in which state court judgments not meeting the strict *Mower* definition of "finality" are nonetheless final:

(1) Cases That Are Functionally Final.

The first category of cases are those which, though formally interlocutory, are in fact functionally final, because nothing more remains to be done in the lower state courts. Obviously, this exception recognizes that further proceedings may occur in the state courts, yet, for one reason or another the federal issue is conclusive or the outcome of further proceedings is preordained. This Court has deemed the judgment "final." *Id.* 420 U.S. at 479.

Quite obviously, this exception does not apply to *Ritchie*, because the further proceedings contemplated in the state courts are more than merely formal. If the trial court finds CWS material relevant, further finds that because of its suppression the defendant was denied his Sixth Amendment rights, the Commwealth is unable to show that the error was harmless beyond a reasonable

doubt, and the trial court awards a new trial, *then* the issue becomes final for purposes of appeal to this Court.

(2) Cases In Which The Federal Issue Will Inevitably Survive The Remaining State Proceedings And No Further Federal Issues Will Emerge.

Ritchie does not present a case in which the federal issue will inevitably survive further proceedings below. *Id.* 420 U.S. at 480. Whether or not it does survive depends upon the motivation of the prosecution in seeking review in this Court. If Pennsylvania seeks review in this Court *solely* because of its desire to preserve the confidentiality of CWS records, then the Sixth Amendment issue will indeed survive, because whatever happens in the lower courts, the State will continue to argue the wrongful interpretation by the Supreme Court of Pennsylvania of the Sixth Amendment claim impairs its ability to preserve the confidentiality of CWS records.

However, if (as is more likely), the State is seeking Supreme Court review *in part* to preserve the trial court's conviction of Mr. Ritchie, then the Sixth Amendment issue will not inevitably survive, because (a) the trial judge may determine that the CWS records are irrelevant, (b) the trial judge may determine that the suppression of the CWS record was harmless, or (c) Ritchie may be retried and reconvicted. If any one of the latter three things occurs, then insofar as the State is seeking Supreme Court review out of a desire to preserve a conviction, it will drop its Sixth Amendment claim.

At this stage of the proceedings, there is no way of knowing whether Pennsylvania is seeking review in this Court in order to preserve Mr. Ritchie's conviction or in order to protect the claim of confidentiality. One way of resolving that question is to wait and to see upon remand whether Pennsylvania discloses the CWS records *in cam-*

era and argues that they are irrelevant or whether it risks contempt by refusing to disclose the records. Indeed, one of the rationals underlying the "finality" requirement of Section 1291 that a subject of a discovery order postpone his appeal until he has been held in contempt is to ensure that the federal courts do not hear appeals from persons who merely *say* they are interested in confidentiality, but are unwilling to act accordingly. See C. Wright, *et al. Ibid.*, Vol. 15, § 3917.

Moreover, even if the Commonwealth of Pennsylvania is seeking Supreme Court review solely to preserve the confidentiality of CWS records, *Ritchie* still fails to qualify for this second *Cox* exception, because *Ritchie* is a case in which further proceedings may indeed raise additional federal questions, such as whether the error of suppressing the CWS records was "harmless."

(3) Cases In Which The Federal Question Would Inevitably Elude Federal Review, If Further State Proceedings Occurred.

This third exception regards as "final" any federal ruling that, because of unusual rules precluding appeal by an aggrieved litigant, the federal issue remains incapable of being reviewed at a later time. *Id.* 420 U.S. at 481. This category includes cases in which a state court reverses a criminal conviction and remands for a new trial on the ground that the defendant was the victim of a federal evidentiary error. Unless the Supreme Court reviews the alleged error immediately, the Court will forever lose the chance to do so; if the jury at the second trial convicts, the state will be unable to appeal, because of the rule that precludes a party from appealing a favorable ruling; and if the jury at the second trial acquits, the state will be precluded from appealing, because of the constitutional prohibition against double jeopardy.

This third exception would indeed apply to *Ritchie*, if the Supreme Court of Pennsylvania had *remanded for a new trial* on the basis of a full disclosure of the CWS material; and it will apply to *Ritchie* if, following a remand to the trial judge, the trial judge determines that the CWS records contained relevant material the suppression of which is not harmless. But *until then*, this third exception does *not* apply to *Ritchie*, because (a) the trial judge may determine that the CWS records do not contain relevant material; (b) the trial judge may determine that the suppression of any relevant material was harmless; and (c) if the trial judge holds that the CWS file contains relevant material, the suppression of which is not harmless, there still will be time and opportunity *then* for Pennsylvania to seek review under this third exception, but *only* after the grant of a new trial.

(4) Cases In Which Immediate Review Will Preclude Further Litigation And Prevent "Serious [Erosion] Of Federal Policy."

The fourth *Cox* exception consists of a catchall category, with a limitation. The catchall category permits review, whenever the failure to review might "seriously erode federal policy." *Id.* 420 U.S. at 483. The limitation applies only when reversal would completely end any further proceedings in the state court. Indeed, *Ritchie* satisfies the limitation requirement, because if the Supreme Court were to reverse *Ritchie*, there would be no further litigation in the lower courts. The lower courts would simply re-enter the conviction and execute the sentence already imposed upon Mr. Ritchie.

On the other hand, *Ritchie* fails to qualify for the general catchall provision, because the failure to review this case immediately cannot be said to "seriously" threaten "federal policy." This case does not present a situation

where the failure to review immediately will result in a person suffering First Amendment or Fourth Amendment or Fifth Amendment or Sixth Amendment injury. The party seeking review here, the Commonwealth of Pennsylvania, is not complaining that the lower court gave *too narrow* a construction to the Sixth Amendment; it is complaining that the lower court gave *too broad* a construction to the Sixth Amendment.

The Commonwealth of Pennsylvania is presenting to this Court a Sixth Amendment *issue*, but the State is not complaining about a Sixth Amendment *injury*. Pennsylvania is not complaining that its Highest Court abridged its Sixth Amendment rights by construing the Sixth Amendment too narrowly. Pennsylvania is complaining that its Supreme Court abridged its residual Tenth Amendment rights by construing the Sixth Amendment too broadly. The Tenth Amendment right of states to be free from excessive federal regulation is not the kind of "identifiable federal . . . constitutional polic[y]" that this Court appears to have had in mind in *Cox*. *Cf. Flynt* v. *Ohio*, 451 U.S. 619, 662 (1981).

Moreover, even if the Tenth Amendment is an "identifiable" constitutional policy, the failure to review *Ritchie* now will not "seriously" erode it, because the only erosion the State faces is the minor intrusion that consists of Ritchie's lawyers alone being given access to the CWS records. This intrusion is not much of an inroad because (a) the CWS statute already envisages all sorts of similar persons being given access, (including a court of competent jurisdiction pursuant to a court order, See Argument II *infra*); (b) the trial judge can impose a protective order on the lawyer not to disclose the material to anyone until its relevance has been ascertained; See, *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984); and (c) if the trial judge determines that the material is relevant and its suppression not harmless, there will be time *then* for Pennsylvania to seek review with this Court, but only after the grant of a new trial.

(5) The Exception Of The Skokie Case

The Supreme Court in *National Socialist Party* v. *Skokie*, supra., held that a refusal by the state court to stay an injunction against a Nazi march was a "final" order for purposes of the constitutional right of persons to obtain either immediate state appellate review or a stay regarding pending injunctions against their demonstrating. The commentators have suggested several ways to read *Skokie*. *See* C. Wright, et al., *Ibid.*, 1985 Supplement.

First, one can argue that the state court's refusal to grant a stay of the injunction was a "collateral order" within the meaning of *Flannagan* v. *United States*, 465 U.S. 259 (1984), and *Cohen* v. *Beneficial Indus. Loan Corporation*, 337 U.S. 541 (1949).[1] This exception does not apply to the present case since (a) the constitutional question in *Ritchie* is not "separate" from the Sixth Amendment harmless error issue, and (b) even if the constitutional question in *Ritchie* is separable, it does not involve an *important* federal right, since the only federal right that could possibly be raised by Pennsylvania is the Tenth Amendment argument that the federal government ought not to intrude upon state's rights.

Second, one can look to the facts of *Skokie* and conclude that it involved particular hardship or irrepairable injury to an important constitutional right under the First Amendment, which has traditionally received special pro-

[1] To the extent *Skokie* applies the "collateral order" doctrine, it is applying to Section 1257, a doctrine that originated under 28 U.S.C. § 1291. See C. Wright, et al., Vol. 15, § 3911.

tection. Obviously, this exception would not apply to *Ritchie*, since (a) the hardship is nonexistant, because the government can refuse upon remand to turn over the CWS record and either suffer a contempt citation or a dismissal of the prosecution that it can then immediately appeal without suffering any legal injury; (b) even if the government produces the CWS records *in camera*, the hardship is confined to the minimal intrusion of disclosing the CWS material to counsel for the defendant; and (c) the Tenth Amendment "right," if it does exist in *Ritchie* even though unannounced, has nonetheless not received the same type of favorable treatment accorded the First Amendment.

As a litigant trying to preserve a trial judgment, Pennsylvania can fully protect itself by (a) disclosing the CWS material to defense counsel *in camera*, (b) arguing that the material is irrelevant to the defense, (c) arguing that the suppression was harmless, and (d) if unsuccessful on the preceeding two arguments, by moving *then* to appeal to this Court after the grant of a new trial.

As a privilege holder trying to preserve confidentiality, Pennsylvania can fully protect itself by (a) refusing to produce the CWS records, and (b) *then* appealing to this Court whatever order the trial court determines appropriate, whether it be a citation for contempt or an order dismissing the criminal case.[2]

Moreover, even if a party is not required to stand in comtempt in order to obtain Supreme Court review of its discovery order, *Ritchie* is still not final until Pennsylvania takes the further step of disclosing the CWS material *in camera* to defense counsel and obtaining a ruling on its relevance and on the harmlessness of its suppression. In doing so, Pennsylvania protects the Supreme Court from having to hear a case that it might have to hear again later on the question of harmless error.

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[2] By analogy, Pennsylvania would *have* to take this latter course before being able to appeal a discovery order it opposes, if jurisdiction were founded upon 28 U.S.C. § 1291. *Ryan* v. *United States*, 401 U.S. 530 (1971).

To be sure, by proceeding with the disclosure *in camera*, Pennsylvania suffers the injury of having to disclose the material that it wishes to keep confidential. But this latter injury is insufficient to override the finality requirement for several reasons: (a) Unless Pennsylvania proves its seriousness by risking contempt (or dismissal) rather than disclose the privileged material one may never know if Pennsylvania's interest in appealing *Ritchie* is based on its desire to preserve confidentiality or on its more likely desire to preserve the conviction. Pennsylvania can always *say* that it is primarily interested in confidentiality, but such statements are suspect when the latter interest also coincides with its prosecutorial interest. (b) The intrusion of confidentiality that consists of disclosing CWS material to defense counsel *in camera*, is very slight, particularly in light of the many disclosure provisions already contained in the statute itself. (c) Even if Pennsylvania *is* motivated by the desire to preserve confidentiality, and even if disclosure to the defense counsel *is* substantial, the underlying right at issue, *i.e.*, the right of Pennsylvania under the Tenth Amendment to be free from overly broad interpretations of the Sixth Amendment is not sufficiently important to justify yet another exception to the rule of finality.

For these reasons, this Court should find no jurisdiction to review this Pennsylvania decision, which lacks "finality" under 28 U.S.C. § 1257, and dismiss the writ as having been improvidently granted.

II. THE CONFRONTATION AND COMPULSORY PROCESS CLAUSES OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRE THE LIMITED DISCLOSURE OF CONFIDENTIAL CHILD PROTECTIVE SERVICE RECORDS TO DEFENSE COUNSEL IN A STATE RAPE-INCEST PROSECUTION UNDER THE CIRCUMSTANCES PRESENTED IN THIS CASE.

The Supreme Court of Pennsylvania has held in the case *sub judice* that the Commonwealth's interest in maintaining the confidentiality of child protective service records may not override a defendant's right to effectively confront and cross-examine the principle witness against him in a criminal prosecution. (Pet. for Cert. 12a). By recognizing the confrontation and compulsory process claims of the defendant, the Supreme Court of Pennsylvania has concerned itself with the intergrity of the truth-seeking process in the fair administration of criminal trials in its state courts. The Court observed that: "disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." *Dennis* v. *United States*, 384 U.S. 855, 870 (1966), (Pet. for Cert. 9a).

At trial, the prosecution sought to establish the guilt of the accused on these criminal charges through the testimony of a 13 year-old witness. As is most often the circumstance found in criminal cases of this nature, the young girl was the only witness presented by the Commonwealth to provide direct evidence of the criminal episode. Other witnesses were called to establish that the complaining witness had discussed these matters with them several weeks after the last criminal episode, which occurred on June 11, 1979.[3] The complainant testified that

[3] The individual reporting the incident to law enforcement authorities was disclosed during the trial and there was never any doubt as to the identity of this individual.

these criminal episodes occurred on a regular basis of three or four times a week for a period of approximately four years prior to June 11, 1979. (J.A. 15a).

During cross-examination, the witness admitted that a representative from Child Welfare Services (CWS) had visited the home in September of 1978, when she and the other children were interviewed by the representative and she was examined by a pyhsician, as a result of the CWS investigation. (J.A. 47a, 48a, 49a, 50a, 60a). The witness admitted that she did not disclose either to the CWS representative or to the doctor in September, 1978, the fact that these episodes of sexual abuse were supposedly occurring during this time and CWS apparently took no further action.

Prior to the first trial on October 23, 1979, counsel met with the trial judge in chambers to discuss the refusal of representatives from CWS to honor a subpoena *duces tecum* for the records compiled on the complaining witness. The attorney for CWS argued that the confidential nature of the records precluded their discovery, citing the confidentiality provisions of the Pennsylvania Child Protective Services Law, 11 P.S. § 2215(a).[4] Defense counsel

[4] At the time of trial, Section 2215(a) provided:

Confidentiality of Records. (a) Except as provided in section 14, reports made pursuant to this act including but not limited to report summaries of child abuse made pursuant to section 6(b) and written reports made pursuant to section 6(c) as well as any other information obtained, reports written or photographs or x-rays taken concerning alleged instances of child abuse in the possession of the department, a county public child welfare agency or a child protective service shall be confidential and shall only be made available to:

(1) A duly authorized official of a child protective service in the course of his official duties.

(2) A physician examining or treating a child or the director or a person specifically designated in writing by such director of any hospital or other medical institution where a child is being

indicated that CWS had conducted an investigation in September of 1978, that the complaining witness had been examined by a doctor as a result, and that the complaining witness would charge that these events were occurring on a regular basis for a period of three years prior to June of 1979. Defense counsel also raised the possibility that the challenged records could disclose the names of witnesses who were discovered by the CWS investigation and were unknown to the defendant. The trial court denied the request and closed the in-chambers conference by stating: "We didn't read 50 pages or more of an extensive record. We have asked for the medical records. There are no medical records that the court reviewed, and that is what we were told." (J.A. 72a).

The central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence. *United States* v. *Nobles*, 422 U.S. 225, 230 (1975). The accused should be "acquitted or convicted on the basis of all the evidence which exposes the truth." *United States* v. *Leon*, 468 U.S. 897 (1984). The Confrontation Clause of the Sixth Amendment to the United States Constitution exists to expose the truth and to "assure fairness in the

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treated, where the physicians or the director or his designee suspect the child of being an abused child.

(3) A guardian ad litem for the child.

(4) A duly authorized official of the department in accordance with department regulations or in accordance with the conduct of a performance audit as authorized by section 20.

(5) A court of competent jurisdiction pursuant to a court order.

Act of November 26, 1975, P.L. 438, No. 724, § 15, 11 P.S. § 2215.

The law has subsequently been amended and now provides for an expanded class of officials and groups to whom the reports may be made available, including the attorney general, court commissioners, and law enforcement officials. *See generally*, 11 P.S. § 2215(a).

adversary criminal process." *United States* v. *Cronic*, 466 U.S. 648 (1984).

This Court has recognized that the prosecutor's role transcends that of an adversary. He "is a representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). "The twofold aim (of criminal justice) is that guilt shall not escape or innocence suffer." *Id.* In reflecting upon the nature of the criminal justice system, this Court observed:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. *United States* v. *Nixon*, 418 U.S. 683, 709 (1974).

The Court went on to hold that:

> . . . when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest of confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial. *Id.* 418 U.S. at 713.

In recognizing the pernicious nature of the claims of privilege, this Court observed "these exceptions for the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Id.* 418 U.S. at 710. The right of confrontation and compulsory process to compel the attendance of witnesses, ". . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington* v. *Texas*, 388 U.S. 14, 19 (1967). Cross-examination ". . . is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, *Evidence*, § 1367, p.29 (3d Ed. 1940). Professor Wigmore further opined that, ". . . cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial-procedure." *Ibid.* It was apparent to Professor Wigmore that, ". . . in some of the great Continental trials, that the failures of justice could hardly have occurred under the practice of effective cross-examination," (and cases cited therein). *Ibid.*

A. The Confrontation And Compulsory Process Clauses Of The Sixth Amendment Apply To Discovery Requests For Privileged Information.

1. The Confrontation Clause

A state may not deny its confrontation obligations simply by alleging that the evidence it wishes to withhold is privileged under state law. *Davis* v. *Alaska*, 415 U.S. 308 (1974).

The Sixth Amendment to the Constitution guarantees the accused in a criminal prosecution, "To be confronted with the witnesses against him." This right is secured for defendants in state, as well as federal criminal proceedings, under the Fourteenth Amendment. *Pointer* v. *Texas*, 380 U.S. 400 (1965). The right of confrontation means more that merely being allowed to confront the witness physically. The primary interest secured by the right of confrontation is the right of cross-examination. *Douglas* v. *Alabama*, 380 U.S. 415, 418 (1965). "Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested." *Davis* v. *Alaska*, supra. 415 U.S. at 316. "The cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." *Id.*

The Confrontation Clause requires a defendant to have some opportunity to show bias on the part of the prosecution witness. *United States* v. *Abel*, 469 U.S. 45 (1984). In *United States* v. *Bagley*, ___ U.S. ___, 105 S.Ct. 3375, 3380 (1985), this Court recognized that impeachment evidence is "evidence favorable to the accused" and as such it is exculpatory evidence establishing a due process claim for disclosure under *Brady* v. *Maryland*, 373 U.S. 83 (1963). Such evidence, if disclosed and used successfully, may make the difference between conviction and acquittal. *Id.* "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue* v. *Illinois*, 360 U.S. 264 (1959).

The *partiality* of a witness is subject to exploration at trial and is always relevant since it discredits the witness and affects the weight of his testimony. *Davis* v. *Alaska*, supra. The exposure of a witness' *motivation* in testifying constitutes an appropriate function of cross-examination as well. *Green* v. *McElroy*, 360 U.S. 474 (1949). The con-

frontation right provides an effective means of challenging the prosecution's evidence by testing the *recollection* and *probing the conscience* of an adverse witness. *Ohio* v. *Roberts*, 448 U.S. 56 (1980).

The focus of the Confrontation Clause is on individual witnesses and a defendant states a violation of this right, ". . . by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which the jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" *Delaware* v. *Van Arsdall*, ___ U.S. ___, 106 S.Ct. 1431, 1436 (1986).

In the present case, defense counsel was permitted to cross-examine the complainant to show that a previous visit had been made by representatives of CWS to the Ritchie home without criminal charges being brought or further action taken. However, while given the opportunity to bring that *fact* to the attention of the jury, defense counsel was denied the opportunity through access to CWS files, to test the witness on *why* no charges had been brought at that time. *Davis* v. *Alaska*, supra. Further, defense counsel had no means of comparing statements given by the witness to CWS officials in September, 1978, and in June of 1979, and thereafter compare both with the testimony elicited at trial in November of 1979. The defendant was thus denied the opportunity to effectively test the recollection and probe the conscience of the adverse witness using these statements. *Ohio* v. *Roberts*, supra. By denying access to the CWS records, the defendant was thus denied the means of effective cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness. *Davis* v. *Alaska*, supra. The suppression of such evidence

surely "undermines confidence in the outcome of the trial." *United States* v. *Bagley*, supra., 105 S.Ct. at 3381.

The restriction on cross-examination may not have been direct in the sense that defense counsel was limited in the possible subjects of his cross-examination that were known to him. However, the limitation was nevertheless real in the sense that ". . . the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack." *Davis* v. *Alaska*, supra 415 U.S. at 318; or the jury could have given *more* weight to this fact, if accompanied by a reason such as motive, bias or the like.

The absolute impediment of privilege erected here arises from Pennsylvania's Child Protective Services Law, which was enacted to identify and protect children suffering from abuse and to provide rehabilitative services to them and to their families. (Pet. for Cert. 6a). In providing procedures concerning the investigation and reporting of abuse cases, the Law has a section providing for the confidentiality of the records CWS so compiles. 11 P.S. § 2215(a). The confidentiality provision states that reports made pursuant to the Law shall be confidential, but made available to certain enumerated classes of officials and groups. Most notably, such reports may be made available to *courts of competent jurisdiction pursuant to court order.* 11 P.S. § 2215(a)(5). As the Supreme Court of Pennsylvania agreed, it would be absurd for anyone to suggest that the General Assembly of Pennsylvania would provide a court with access, yet deny access when such materials would assist in the truth-seeking process in a criminal trial.

2. The Compulsory Process Clause

Quite frankly, the lack of relevant case law renders the search for an answer under the Compulsory Process

Clause more difficult, but existing decisional authority clearly marks the path to the conclusion that the Compulsory Process Clause applies with equal force to discovery requests for privileged information.

Chief Justice John Marshall implied, but did not have to hold, that the Compulsory Process Clause applied to privileged information sought by Aaron Burr and held by President Thomas Jefferson. *United States* v. *Burr*, 25 Fed. Cas. 30 (No. 14,692d) (CC Va. 1807). Later, in *United States* v. *Nixon*,[5] *supra*, the Court stated by means of *dicta* that the right of the parties to the production of all relevant evidence at a criminal trial in order to assist in the seeking of the truth has "constitutional dimensions" implicating the Compulsory Process Clause. The Court further opined that, "It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced." *Id.* 418 U.S. at 711.

A number of state courts and lower federal courts have held that the Compulsory Process Clause applies to privileged information. *See* P. Westen, *Reflections on Alfred Hill's "Testimonial Privilege and Fair Trial,"* 14 Mich. J. of Law Reform 371 (1981); P. Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71 (1974); P. Westen, *Confrontation and Compulsory Process*. 91 Harv. L. Rev. 567 (1978).

This Court has already traveled this path ". . . in what might loosely be called the constitutionally guaranteed access to evidence" in other cases. *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). In establishing the requirement for a preliminary showing of "materiality" to sustain a claim under the Compulsory Process Clause, this Court adopted the "materiality" concept already defined in the line of cases dealing with the discovery requests under the due process clause of the Fifth Amendment. *Brady* v. *Maryland*, 373 U.S. 83 (1963). In *Brady*, the Court held, "That the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution." *Id.* 373 U.S. at 87. A *Brady* claim will prevail, "where the evidence is favorable to the accused and is material either to guilt or to punishment." *Moore* v. *Illinois*, 408 U.S. 786, 794 (1972); *Pyle* v. *Kansas*, 317 U.S. 213 (1942). Impeachment evidence is discoverable. *United States* v. *Bagley*, supra.

[5] The decision in *Nixon* involved discovery requests on *non-constitutional* grounds for material that was arguably presumptively protected by a constitutional privilege. The case *sub judice* is based upon a request on *constitutional* grounds for material presumptively privileged on non-constitutional grounds.

Certainly, more than the mere absence of testimony is necessary to establish a violation of the right. *United States* v. *Valenzuela-Bernal*, supra. Some "plausable showing" of how the testimony would have been both material and favorable to the defense must be made. *Id.*

B. The Degree Of Probativeness Privileged Information Must Possess Before Entitlement To Discovery Attaches.

The Supreme Court of Pennsylvania found the privilege in the present case must give way to the right of the defendant, *through his counsel*, to review the CWS records in order to obtain any relevant material, including statements of the victim, names of other witnesses, or other circumstances developed by the investigation. (Pet. for Cert. 11a) Relevant evidence is defined as that evidence which tends to make an issue in dispute more or less probable.

No interest on the part of the State in the combination of secrecy and prosecution justifies convicting a criminal defendant, who, if he had access to privileged information, could raise a reasonable doubt in the minds of the jury about his guilt. When confronted with the issue, the courts must necessarily "weigh" the competing interests of the state in protecting privileged information and in granting access to it in order to accord to the defense an opportunity for *effective* cross-examination and compulsory process, which also serves the legitimate state interest of promoting the essential truth-seeking function of its criminal trials. On the one hand, such privilege statutes must be accorded deference, because a state legislature has already identified a worthy interest deserving protection. On the other hand, the state also has an interest in the administration of justice to assure the fairness of the truth-seeking process during its criminal trials. Under the circumstances presented by this case, the interest of the defendant in confrontation and compulsory process is identical to that of Pennsylvania in assuring the fairness of this truth-seeking process.

When the interests of privilege and confrontation meet in conflict, a court must necessarily accommodate both interests, without destroying the fabric of the judicial process nor the cloak of privilege. In weighing these interests, the more compelling the need to ascertain the truth, the less weight the privilege should carry.[6]

In recognizing the need for a "materiality" threshhold in order to establish entitlement to the compulsory process claim, this Court has stated that not everything that "might influence a jury" must be disclosed. *United States* v. *Valenzuela-Bernal*, supra., 458 U.S. at 866. Clearly, a

[6] As with any general rule, exceptions will persist such as the right against self-incrimination, which exists by virtue of the Constitution.

defendant cannot overcome a privilege merely upon the vacuous whimsy that something in the materials "might" be of assistance. On the other hand, a defendant cannot be expected, by himself, to show in advance the contents of a file he has never seen. In other words, the seeker of such information must be able to articulate *some reason* to show that the information he seeks may possess the requisite degree of probativeness.

As this Court in *Alford* v. *United States*, 282 U.S. 687, 692 (1931), recognized:

> It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from the denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to the test, without which the jury cannot fairly appraise them. . . . to say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

"Implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *United States* v. *Agurs*, 427 U.S. 97, 104 (1976). The Court further explained:

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt . . . this means that the omission must be evaluated in the *context of the entire record.* If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionalble validity, additional evidence of relatively minor importance might be sufficient to

create a reasonable doubt. *Id.* 427 U.S. at 112-113. (Emphasis added).

The "materiality" concept was further defined as follows:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the preceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *United States* v. *Bagley,* supra. 105 S.Ct. at 3384.

In evaluating the *entire record* in the case *sub judice,* the defendant can point to *compelling reasons* to establish entitlement for disclosure of the CWS files. At the pre-trial conference in-chambers, defense counsel was able to point out that the prosecuting witness complained of assaults, which she claimed occurred on a regular basis of two or three times a week for a period of three years. (J.A. 65a, 67a) The last such event, which led to the filing of criminal charges, occurred on June 11, 1979. Defense counsel disclosed that CWS conducted an in-home evalution in September of 1978 and the girl was referred to a physician for a physical examination. It is important to note that no criminal charges arose from the investigation conducted by CWS in September of 1978. Furthermore, CWS possessed a file containing over 50 pages, which the trial court admitted it did not read prior to dismissing the discovery claim of the defense. (J.A. 72a)

The trial testimony indicates the young girl was the *only* witness produced by the prosecution to testify or present any direct evidence whatsoever that any crime had ever occurred. Other witnesses were called to testify that the young girl gave certain statements after she disclosed these criminal episodes to her girl friend. In this

sense then, the testimony of this witness was *crucial* to the prosecution's case.

Therefore, the record reflects the CWS records should contain two types of evidence possibly of value to the defense: (1) Oral statements of the complaining witness obtained pursuant to the CWS investigation after June 11, 1979, when criminal charges were filed, and during the initial CWS investigation in September of 1978; and (2) Other information gathered by the CWS investigation concerning possible interviews with witnesses in September of 1978, and in response to complaints of criminal activity on June 11, 1979.

The CWS files thus disclose: (1) facts, (2) that the Commonwealth of Pennaylvania has gathered, (3) in response to allegations of criminal conduct, (4) regarding the very charges for which the defendant was tried, (5) and the defendant has no reason to know nor any other opportunity or source to investigate and obtain the information.

In *Davis* v. *Alaska*, supra., this Court held that the kind of testimonial privilege at issue (the disclosure of juvenile records), must give way to the constitutional right of the defendant to discover evidence of "bias" regarding a "crucial prosecution witness." In *United States* v. *Nixon*, supra., 418 U.S. at 713, the Court held the Presidential privilege at issue there must give way to the right of the prosecutor to show a "demonstrated, specific need for evidence in a pending criminal trial."

In *Roviaro* v. *United States*, 353 U.S. 53 (1957), the Court held that the government's interest in protecting the identity of an informant must give way to the right of the defendant for disclosure, when the disclosure of the informer's identity, or the contents of his communication, was "relevant and helpful to the defense of the accused, or

essential to a fair determination of the cause." *Id.* 353 U.S. at 60.[7] In *Smith* v. *Illinois*, 390 U.S. 129 (1968), the Court held that, notwithstanding a contrary state evidentiary law, the confrontation clause guarantees the defendant the right to cross-examine a prosecution witness as to his real name and address. In *Washington* v. *Texas*, supra., the Court held that the compulsory process clause requires, even as opposed to a contrary state provision, that a defendant be able to present the favorable testimony of a co-defendant.

In the context of the Fourth Amendment, the Court has stated that a defendant's interest in obtaining some types of evidence to show "taint" is sufficient to put the government to the choice of either dismissing a prosecution or disclosing even highly sensitive national security secrets. See *Alderman* v. *United States*, 349 U.S. 165 (1969); *Giordano* v. *United States*, 394 U.S. 310 (1969).

When one considers that the privilege established for the CWS files in the present case permits access to a court of competent jurisdiction upon court order and the state legislature by amendment later expanded the number of groups or officials who could claim access, to include law enforcement officials (meaning the District Attorney) the claim of privilege must fall to the claim of the defense based upon *compelling reasons* established after a review of the *entire record* of the case. The remaining question concerns the degree of disclosure such entitlement entails.

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[7] As in the present case, the government in *Rovario* alleged that the purpose of the privilege (to further and protect the public interest in effective law enforcement and to encourage citizens to communicate their knowledge of the commission of crimes to law enforcement officials, by preserving their anonymity) absolutely prohibited the disclosure of the informer's identity to the defense.

C. The Procedural Protections To Ensure The Reliability Of The In Camera Inspections Of The Privileged Material.

In fashioning a remedy for recognition of the defendant's entitlement to the Sixth Amendment claim, the Supreme Court of Pennsylvania remanded the matter to the trial court with instructions that the defendant, *through his counsel*, be granted access to the CWS files. The Supreme Court reminded everyone that the trial court should take appropriate steps to ensure against the improper dissemination of sensitive material gleaned from the files. These steps might include the fashioning of appropriate protective orders and the conducting of certain proceedings *in camera*, but mindful always that the defendant *through his counsel*, was to gain access to the information in order to argue to the trial court, what use, if any, the defense could have made of the material in cross-examining the complainant or in presenting other evidence. Unless the trial court was convinced that any error was necessarily harmless, it was to vacate the judgment of sentence and grant the defendant a new trial. (J.A. 12a-13a). The remedy thus fashioned was in recognition of long-standing Pennsylvania law that accorded to counsel certain privileges, because "with the eye of an advocate," defense counsel may discern relevancy not otherwise readily apparent to the trial judge or to the prosecutor. *Commonwealth* v. *Hamm*, 474 Pa. 487, 378 A.2d 1219 (1977).[8] Two alternate grounds for the remedy employed here may be gleaned from existing federal authority.

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[8] Respondent recognizes the decision in *Delaware* v. *Van Arsdall*, supra., may be read to establish that this Court has jurisdiction to review a state court's *remedy* for a Federal Constitutional violation. (Stevens, dissenting).

(1) The Approach Of The Nixon Case.

In *United States* v. *Nixon*, supra., 418 U.S. at 716, n. 21, this Court fashioned a remedy whereby the District Court was given the discretion "to seek the aid of the Special Prosecutor and the President's Counsel for *in camera* consideration of the validity of particular excisions, whether the basis of excision is relevancy or admissibility," or under *United States* v. *Reynolds*, 345 U.S. 1 (1953) or *C. & S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948).

Certain factors present here disclose the need and the advisability of participation by defense counsel in reviewing the privileged material. These factors include: (a) where the state's interests in confidentiality are weak, (b) where the privileged information goes to the question of a criminal defendant's factual innocence, (c) where the relevance of the privileged information cannot easily be determined on a nonadversarial basis, (d) where the defendant has shown some reason to believe that the privileged file may contain relevant material, (e) where the defendant's adversary, the prosecutor, has access to the privileged file to inspect it at will, and (f) where the defendant is seeking the limited intrusion upon the privilege that consists of *the attorney*, and *the attorney alone*, having the opportunity to inspect the file. Under these circumstances, the privilege must yield to the right of the defendant under the Sixth Amendment to put on a defense by having his counsel review the file.

(a) The Weak Nature Of The State's Interest In Secrecy In The Case Sub Judice.

In *United States* v. *Nixon*, supra., this Court intimated that the stronger the government's interest in secrecy, the greater the burden on the seeker to show relevancy and materiality in order to gain access to such material. *Id.*

418 U.S. at 705-07. The Court distinguished for purposes of prosecutorial discovery the *qualified* presidential privilege for intra-executive communications and the possible *absolute* presidential privilege for diplomatic and military secrets.

Under the Pennsylvania statute, a number of individuals are allowed access to the file, including most notably a court of competent jurisdiction pursuant to court order. Furthermore, the fact that the General Assembly for the Commonwealth of Pennsylvania later amended the statute expanding the number of classes of individuals permitted access further indicates the limited nature of the confidentiality provided. Of note also is the fact that the District Attorney now has access to the files, regardless of whether or not he actually uses those files during the trial.[9]

(b) The Significance Of Factual Innocence.

The Court has distinguished, for constitutional principles, between privileged information that goes to *factual* innocence and privileged information that goes solely to issues of *legal* innocence. Compare *Roviaro* v. *United States*, supra., and *Smith* v. *Illinois*, supra., with *McCray* v. *Illinois*, 386 U.S. 300 (1967). The former cases allowed disclosure, when the credibility of the informant became an essential issue at trial. The later case held that the defense was not constitutionally entitled to discover the identity of a government informer for the purposes of challenging a search or a seizure.

The significance of the request by the defense in the case *sub judice* for the opportunity to *effectively* cross-

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[9] Whether or not the District Attorney uses the material during the trial is not really relevant, unless his nonuse may indicate unfavorable information from the prosecution viewpoint.

examine the only witness for the prosecution and for possible exculpatory evidence to be used at trial is all the more apparent, because of its bearing upon the central question of fact relating to the credibility of the witness.

(c) The Need For An Adversarial Procedure.

The Supreme Court has distinguished for constitutional purposes between issues that are so complex, factually, that they should be resolved on an adversarial basis and issues that are so simple they need a less elaborate protection system. *Compare, Alderman* v. *United States*, 394 U.S. 165 (1969) (whether an illegal search had so "tainted" the prosecution's case was so complex, factually, that it could not be resolved on an *ex parte* basis, but must be resolved on an adversarial basis), with *Taglianetti* v. *United States*, 394 U.S. 36 (1969) (whether the defendant was the person whose house was illegally searched or whose conversations were illegally overheard constituted a simple factual question that a judge could resolve *ex parte*).

In this manner also, the trial court will benefit from defense counsel's "well-informed advocacy." *Alderman* v. *United States*. supra., 394 U.S. at 184; *Jencks* v. *United States*, 353 U.S. 657, 669 and n.14 (1957). "In our adversary system it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Dennis* v. *United States*, supra., 384 U.S. at 875. As this Court has observed:

> An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event . . . may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all

> relevant circumstances. . . . [T]he task is too complex, and the margin for error too great, to rely wholly on the in camera judgment of the trial court. . . . *Alderman* v. *United States*, supra., 394 U.S. at 182.

Measured by this standard, the present case calls for an adversarial process. Whether the privileged information could be useful to the defense is the kind of determination that is so complex factually it can only be made accurately with the participation of defense counsel, who is thoroughly familiar with the defendant's case and motivated to view the issues from the defense prospective.

(d) The Defense Showing Of Some Reason To Believe That The File May Contain Exculpatory Material.

Quite justifiably, this Court is reluctant to allow "fishing expeditions" based upon insincere claims of need in order to obtain access to government files to perhaps blackmail the prosecution into dropping the case. Very simply, the protection against such blackmail is to require the defense to make *some showing* that the privileged file may contain exculpatory information. Based upon the foregoing argument, *supra.*, subpart B, Mr. Ritchie has shown *compelling reasons* for access to the privileged information based upon a review of *the entire record*.

(e) The Defendant Is Seeking Access To A File, To Which His Adversary, The Prosecutor, Has Access.

State rules of evidence that allow prosecutors a one-way advantage in the gathering or presentation of evidence in a criminal trial are necessarily suspect. See *Wardius* v. *Oregon*, 412 U.S. 470 (1973). Given different circumstances and a different privilege statute, the State may have a stronger argument in keeping such information confidential. However, Pennsylvania may not under *Wardius*, supra., create a one-way privilege to the disad-

vantage only of the defense by giving the prosecutor the right to inspect CWS files whenever he chooses.

(f) The Limited Intrusion Of Defense Counsel.

The Pennsylvania Supreme Court held the privileged information here must be disclosed on a limited basis to *defense counsel;* it is *not* to be disclosed to the defendant or to the public. As an officer of the court, counsel can be ordered to keep the privileged information secret. *Cf.*, *Seattle Times Co.* v. *Rhinehart*, supra.

It is important to note that the Pennsylvania Supreme Court did *not* invalidate the entire statute. On the contrary, the Court ruled on the privilege only to the limited extent that a defendant's *lawyer* be allowed into the judge's chambers to inspect material to which his opponent, the prosecutor, already has access.

The limited nature of the intrusion is relevant, since, to the extent the Sixth Amendment issue turns on a balancing of the State's interests against the defendant's, the State's interest in keeping defense counsel out of the judge's chambers is much less that its interests in withholding completely the CWS material from the public at large. *Cf.*, *United States* v. *Nixon*, supra., 418 U.S. at 713-16.

(2) The Alternative Approach Under The Freedom Of Information Act Cases.

An alternative analysis exists for the remedy pursuant to decisions of the lower federal courts under the Freedom of Information Act, 5 U.S.C. § 552. Admittedly, the Court of Appeals has rejected requests for counsel inspections on the ground that *other* protections existed in those cases to ensure that the *in camera* procedures were reliable and accurate, thus implying that in the absence of such supplemental procedures, a plaintiff seeking such information might have a statutory right under the FOIA to insist that his lawyer be allowed to inspect and argue the relevance of the presumptively privileged material. These other procedures cited with approval included: (1) a requirement that the government prepare as full an affidavit as possible for disclosure to plaintiff's counsel, explaining its reasons for withholding the requested information; (2) a requirement that the government also prepare, if necessary, a confidential affidavit for the judge's benefit to assist him in reviewing the privileged material *in camera* and *ex parte;* (3) and a requirement that the privileged material, plus accompanying affidavits, be sealed and filed with the trial court as an exhibit for the benefit of any appellate court that might wish to review the matter. *See, e.g.*, *Weberman* v. *NSA*, 668 F.2d 676 (D.C. Cir. 1982); *Phillippi* v. *CIA*, 546 F.2d 1009, 1012-13 (D.C. Cir. 1976); *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973). See also, *United States* v. *Schneiderman*, 104 F. Supp. 405 (C.D. Calif. 1952).

Given the failure of Pennsylvania to provide alternate, reliable safeguards of the foregoing nature to ensure that *in camera* and *ex parte* review procedures are accurate and reliable, Pennsylvania has the consitutional obligation to permit defense counsel to participate with the trial judge in reviewing the CWS file to determine whether it contains relevant information. Stated otherwise, unless a state creates adequate and reliable procedures to safeguard *in camera* inspections, it has a constitutional obligation to ensure access to accurate and reliable information by allowing defense counsel to participate in the inspection process. In this manner, each state may determine for itself the nature of its privilege, balance against it the competing interests of the need by the defense to obtain access to such information and thereby ensure the integrity of the truth-seeking function paramount in criminal trials.

Since the Pennsylvania statute allows production of the CWS privileged information pursuant to a court order issued by a court of competent jurisdiction, one must presume the General Assembly balanced the competing interests, recognized the importance of the truth-seeking process in criminal trials and provided the remedy utilized here by the Supreme Court of Pennsylvania.

CONCLUSION

For these reasons, the writ of certioari should be dismissed as having been improvidently granted, since the decision *sub judice* does not present a "final judgment" for review pursuant to 28 U.S. § 1257.

Alternatively, upon addressing the merits of the Sixth Amendment claim, this Court should affirm the judgment rendered by the Supreme Court of Pennsylvania.

Respectfully submitted,

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(Amicus Curiae, Invited by Court, per Order of July 7, 1986)
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